SUPREME COURT, U. S. 653

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IN THE

Supreme Court of the United States

October Term, 1967

FROHMAN HOLLAND, IRVING HOLLAND, HARVEY MILLER, ROBERT SAUNDERS, BERT GILBERT, on their own behalf and on behalf of all other persons similarly situated,

Plaintiffs-Appellants,

RICHMOND KOTCHER, NORTON KOTCHER, DAVID GIMPEL and JACK SACKS,

Intervenor Plaintiffs-Appellants,

MICHAEL W. CAMMAROSANO and EDWARD BRENNAN and all other officers and employees of the Borden Company,

Intervenor Plaintiffs,

against

FRANK S. HOGAN, District Attorney and SAMUEL YASGUR, Assistant District Attorney and each and every Assistant District Attorney of New York County, and SAMUEL ADLER,

Defendants-Appellees,

LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,

Intervenor Defendant-Appellee.

APPELLANTS' JURISDICTIONAL STATEMENT ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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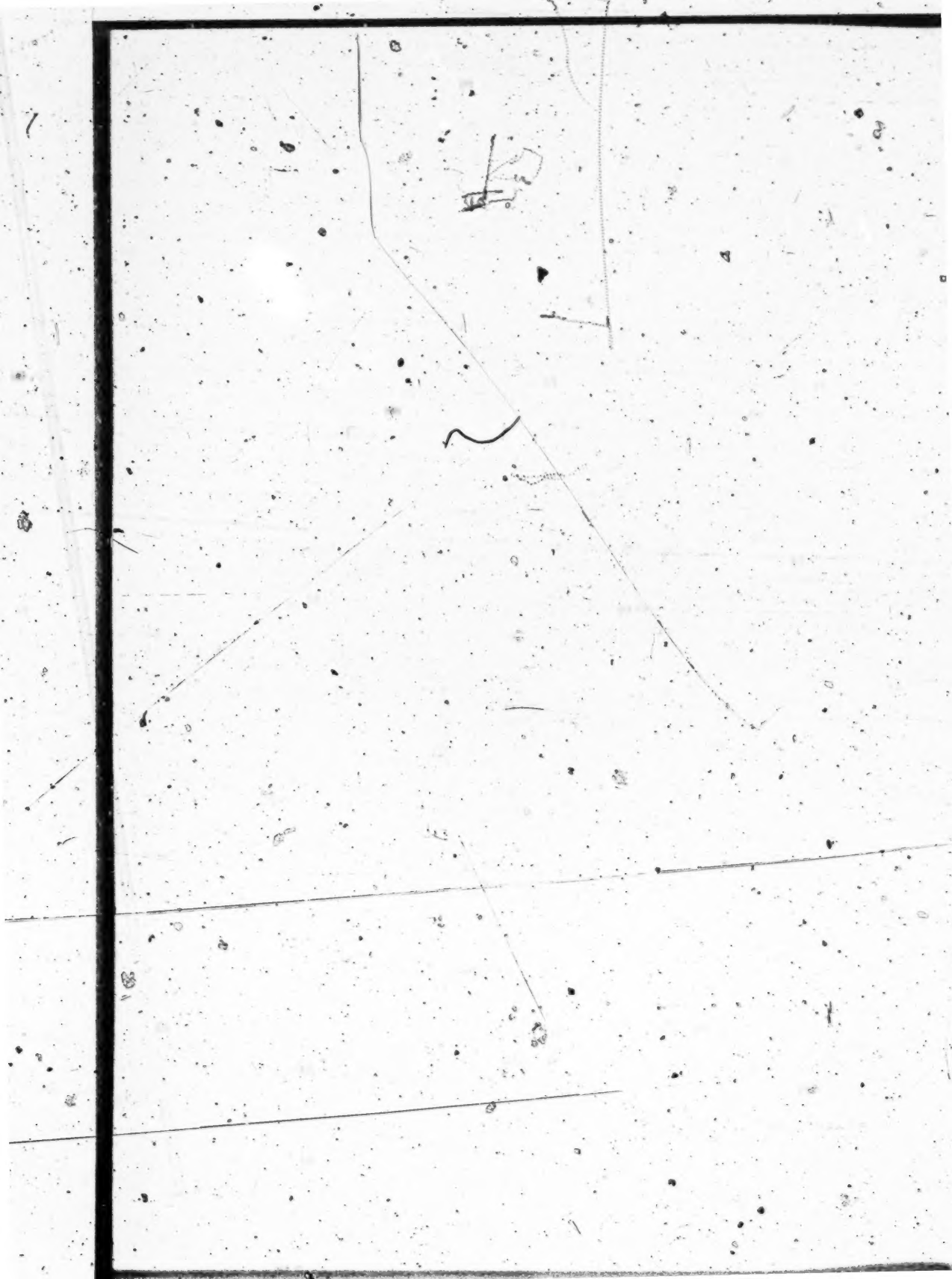

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LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,

Intervenor Defendant-Appellee.

APPELLANTS' JURISDICTIONAL STATEMENT ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

This jurisdictional statement is submitted on behalf of Plaintiff-Appellants, Frohman Holland, Irving Holland,

Harvey Miller, Robert Saunders, Bert Gilbert, on their own behalf and on behalf of all other persons similarly situated, and Intervenor Plaintiffs-Appellants Richmond Kotcher, Norton Kotcher, David Gimpel and Jack Sacks,[1] in support of their appeal to this Court from the Order of the United States District Court for the Southern District of New York denying plaintiffs' motion for a preliminary injunction and for summary judgment and staying this action pending resort to state court proceedings by the plaintiffs and/or their corporations, which Order was entered in this action on June 27, 1967.

Opinion Below

The opinion of the Court below is reported in —— F. Supp. —— (S.D.N.Y. 1967) and is reprinted herein at Appendix A.

Jurisdiction

(i) This is an action brought under 42 U.S.C. §1983 to enjoin defendants under color of New York State statutes, ordinances, regulations, customs, and usages from subjecting or causing to be subjected, plaintiffs and other persons similarly situated to the deprivation of their rights, privileges, and immunities secured by the Constitution of the United States, and more particularly, their rights under the Fifth and Fourteenth Amendments to the United States Constitution not to incriminate themselves. Said action specifically sought an interlocutory and permanent injunc-

1. Since both the original plaintiffs and the intervenor plaintiffs who join in this appeal are in the identical position, this jurisdictional statement will refer to both groups as plaintiffs.

tion restraining the enforcement, operation, and execution of certain New York statutes described below by restraining the action of the defendants as officers of New York State in the enforcement or execution of those statutes. Plaintiffs' motion for an interlocutory injunction and summary judgment was referred to a three-judge court convened by order of Judge William B. Herlands dated April 14, 1967 pursuant to the provisions of 28 U.S.C. §§2281, 2284.

(ii) The Order sought to be reviewed was dated and entered on June 27, 1967. The Notice of Appeal therefrom was filed with the Clerk of the United States District Court for the Southern District of New York on July 26, 1967.

(iii) This Court has jurisdiction of this appeal by virtue of 28 U.S.C. §1253.

Statutes Involved

Plaintiffs rely upon the Fifth and Fourteenth Amendments to the United States Constitution. Plaintiffs' action was brought pursuant to 42 U.S.C. §1983. The statutes involved herein are Sections 103-b of the New York State General Municipal Law, 139-b of the New York State Finance Law, and 2602 of the New York State Public Authorities Law.[2] The constitutional provisions and statutes involved are set forth in Appendix B hereof.

2. The wordings of these three statutes are virtually identical except that 103-b refers to contracts with New York State municipal corporations and fire districts, 139-b refers to contracts with the State of New York and 2602 refers to contracts with New York State Public Authorities. For convenience, we will generally refer to 103-b alone but any discussion of that statute applies with equal force to the other two statutes attacked herein.

Questions Presented

(i) Was the three-judge District Court correct in abstaining from deciding the merits of this case and ordering a stay of this action, without any proceeding involving these parties pending in New York State Courts, in view of: the federal constitutional rights of plaintiffs which are involved herein; the irreparable injuries to plaintiffs inflicted by the state conduct complained of herein; and the nature of the state statutes attacked herein as unconstitutional?

(ii) Assuming that the District Court should not have abstained, are the statutes attacked herein constitutional under the Fifth and Fourteenth Amendments to the United States Constitution?

(iii) Assuming that the statutes attacked herein are constitutional, are the activities of defendants enjoinable insofar as they were not mandated by the statutes attacked herein and do such activities constitute unauthorized deprivation of plaintiffs' rights under the Fifth and Fourteenth Amendments to the United States Constitution?

Statement

This case involves coercion used by the District Attorney to attempt to compel businessmen to waive their rights against self-incrimination when subpoenaed before a grand jury and the penalty invoked by other public officials when the businessmen refused to waive their rights. The District Attorney and other public officials purportedly acted pursuant to a state statute.

Each plaintiff is an officer or director of one or more milk companies engaged in the processing, sale and dis-

tribution of milk in the metropolitan New York area. Each was subpoenaed to appear before the Third March 1967 Grand Jury of the County of New York pursuant to an investigation initiated by the District Attorney of the County of New York. Previously, two other milk company executives had been subpoenaed to appear before that Grand Jury and asked to sign a general waiver of immunity. Upon their refusal to do so, no action was taken by the District Attorney to coerce them to testify.

Subsequently, however, when the plaintiffs and other milk executives appeared pursuant to subpoena and before they entered the grand jury room, an assistant district attorney presented each of them with an unlimited waiver of immunity printed on a form containing the naked reference that the waiver of immunity was "pursuant to Section 103-b of the General Municipal Law." The statute and its sister statute barred persons refusing to testify concerning transactions and contracts with public agencies from public contracts for a five year period. The ban includes corporations of which such persons are officers and directors. Upon advice of counsel, plaintiffs and a number of other milk executives informed the assistant district attorney that they would not sign the unlimited waiver of immunity form. The District Attorney never offered the witnesses a waiver of immunity limited to transactions or contracts had with public agencies although Section 103-b and its sister statutes apply only to testimony "concerning any transaction or contract" with the public agencies specified therein.

Knowing that the milk executives would refuse to sign an unlimited waiver, assistant district attorneys nevertheless paraded them before the Grand Jury and confronted them with the dilemma whether or not they would sign the

same unlimited waiver of immunity form. An assistant district attorney threatened each witness in front of the Grand Jury that if he persisted in his refusal he and any firm with which he is associated with would be disqualified from doing business with the City and State of New York for a period of five years.

The context of these threats varied greatly. Nineteen of the milk executives were simply told that the Grand Jury was conducting an investigation to determine whether the crimes of conspiracy, coercion, extortion, bribery of labor union representatives, bribery of a public official and bid-rigging (otherwise unspecified) among other crimes, had been committed in relation to the processing and distribution of milk in the New York City area during the past two or three years. The assistant district attorney did not furnish the witness with any particulars about the alleged bid-rigging or even whether it concerned a contract with a public agency covered by Section 103-b.

After the commencement of this action on March 30, 1967, three other milk executives were told by an assistant district attorney that the Grand Jury was investigating the crimes of conspiracy to rig bids on *public* contracts, extortion, bribery, and other violations of the New York Penal Law relating to public contracts for the sale and purchase of milk products by the City of New York and other government agencies, and that the witnesses' testimony was desired in relation to that inquiry.

Thus the history of the Grand Jury proceedings indicates a gradual awakening of the District Attorney to the availability of Section 103-b as a means to coerce witnesses and how to colorably satisfy its statutory requirements. The first two witnesses were not threatened with 103-b at all. The next group of nineteen witnesses were threatened

with 103-b, but the District Attorney failed to indicate to these witnesses that the Grand Jury investigation was one which allowed the use of 103-b. It was not until the instant action was instituted that the District Attorney at last apprised the final three witnesses that the investigation concerned public contracts covered by Section 103-b.

But the District Attorney's education concerning Section 103-b did not extend to the witnesses' rights thereunder. Plaintiffs have alleged, and defendants have not denied, that none of the witnesses threatened with Section 103-b was asked to sign a waiver limited to testimony concerning transactions or contracts covered by Section 103-b.

Instead, they were each confronted with unlimited waivers covering every crime set forth in the New York Penal Law whether or not they involved transactions or contracts with public agencies.[3]

Following the refusal of the plaintiffs to sign unlimited waivers of immunity, the District Attorney wrote letters dated March 27, 1967 to the Governor of the State of New York, the Mayor of the City of New York, and various State and City agencies, including the New York City Department of Purchase (of which defendant Samuel Adler is Director of Purchasing), informing them that the plaintiffs had refused to sign waivers of immunity pursuant to Section 103-b, the effect of which was to "black list" them from public contracts for a five year period.

On March 29, 1967, defendant Adler upon examining the bids for monthly contracts to supply milk and cream to

3. Although the District Court opinion indicates that after the first two witnesses were called, "the inquiry was narrowed to the subject of municipal and state contracts and possible crime committed in connection with them", this is incorrect. This assertion is made upon the basis that subsequent to the Disctrict Court opinion, the Grand Jury handed down indictments against a number of milk executives subpoenaed after the purported narrowing, which alleged misdemeanors having nothing to do with public contracts.

various city institutions during the month of April 1967, ascertained that two of the bidding companies employed officers named in the District Attorney's letter—Queensboro Farm Products, Inc. (hereinafter referred to as "Queensboro") and Weissglass Gold Seal Dairy Corp. (hereinafter referred to as "Weissglass")—and were low bidders for city contracts for three specified groups of city institutions.[4]

On March 30, 1967, this action was initiated by the original plaintiffs,[5] including plaintiff Harvey Miller, the President of Queensboro. Plaintiffs immediately sought a temporary restraining order from District Court Judge Frederick v. P. Bryan. At the hearing on plaintiffs' application, Morgan Lipton, Assistant Corporation Counsel of the City of New York, representing defendant Adler, stated to Judge Bryan that Section 103-b was self executing and that under its terms the City was forced to disregard the bids of Queensboro, Weissglass, and all other milk companies named in the District Attorney's letter. Judge Bryan denied plaintiffs' request for a temporary restraining order and thereafter defendant Adler, acting upon Mr. Lipton's then view of Section 103-b, disqualified Queensboro and Weissglass and awarded those contracts

4. New York City conducts monthly bidding for contracts to supply certain city institutions, principally its hospitals, with milk and cream for the forthcoming month. The bidding is by a geographic grouping of city institutions established by the Department of Purchase. Of course the terms of 103-b and its sister statutes extend to all contracts with all public agencies as well as these monthly contracts.

5. The original plaintiffs sued on their own behalf and on behalf of all other persons similarly situated. The complaint was described by the three-judge District Court as containing "the conventional allegations for a class action under Fed. R. Civ. P. 23." Subsequently six other plaintiffs intervened herein.

to the next lowest bidder—National Dairy Products Corporation (Sealtest Foods Division).

Judge Bryan, however, signed an order to show cause bringing on an application to convene a three-judge court pursuant to the provisions of Sections 2281 and 2284 of Title 28 of the United States Code to determine plaintiff's motion for a temporary injunction and summary judgment. This application came on to be heard before District Judge William B. Herlands. By that time, Mr. Lipton had changed his position about the meaning of Section 103-b. Before Judge Herlands, on the application for the three-judge court, Mr. Lipton argued that Section 103-b did not mean what it appeared to say on its face—that persons availing themselves of their constitutional prerogative not to sign waivers of immunity were *automatically* deprived of the right to do business with the City and State of New York for five years. Instead, Mr. Lipton construed the statute as allowing the City of New York to hold hearings before a Board of Responsibility[6] to determine whether such person or a corporation of which he is an officer or director, should "be disqualified pursuant to Section 103-b." In conformity with Mr. Lipton's second interpretation, the then New York City Commissioner of Purchase, Richard Lewisohn, submitted an affidavit indi-

6. Boards of Responsibility are provided for by a resolution of the New York City Board of Estimate. Such a board consists of representatives of the City Comptroller, the City Corporation Counsel (customarily Mr. Lipton) and the city agency making the contract (here the Department of Purchase). Such a board has power to authorize that a low bid be disregarded by finding the bidder "not responsible". As Mr. Lipton admitted in oral argument, Boards of Responsibility are not convened for every bid but only where there are grounds for believing the low bidder not to be responsible.

cating that this was the procedure his department was following.

On April 14, 1967 Judge Herlands determined that a substantial constitutional question had been raised and accordingly ordered that a three-judge court be convened. The court so convened held its hearing on May 4, 1967. But by that time, Mr. Lipton had changed his position once again. This time he argued irrespective of what Section 103-b meant, it would not now be enforced in accordance with its express terms. Rather the City would call a Board of Responsibility to determine whether a corporation is not a "responsible bidder" because one of its officers or directors refused to sign a waiver of immunity. If the Board concluded that the bidder was not "responsible" the bidder would be barred from public business. Mr. Lipton submitted an affidavit from the new Acting Commissioner of the Department of Purchase, Marvin Gersten, indicating that his Department was then following Mr. Lipton's third interpretation of the effect of Section 103-b.

At the oral argument before the three-judge court, Mr. Lipton admitted that Boards of Responsibility were not automatically convened for every bid but were called only when there was some special reason to do so. Under Mr. Lipton's latest interpretation of Section 103-b, therefore, the exercise of a person's constitutional prerogative not to sign a waiver of immunity would occasion the calling of a Board of Responsibility at which the person and his corporation could "explain the refusal to waive immunity".[7] Failing to "explain" results in a disqualification to do public business.

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7. At the oral argument, the Attorney General of the State argued that a hearing was not required under 103-b; that 103-b automatically disqualified the bidder. His interpretation was subsequently adopted by the New York Court of Appeals, as will be set forth below.

To illustrate that the City's latest procedure is but the use of Section 103-b in a different guise, plaintiffs submitted the transcript of a Board of Responsibility hearing on the low bids of Dairymen's League Cooperative Association, Inc. (hereinafter referred to as Dairymen's League) for the May requirements of milk and cream at certain institutions operated by the City of New York. Although not technically convened under Section 103-b,[8] the Board of Responsibility was convened after certain Dairymen's League *employees* refused to sign waivers of immunity before the Grand Jury. The transcript indicates that the convening was occasioned by that fact, and that fact alone. One of the Dairymen's League employees who had previously exercised his constitutional rights before the Grand Jury was asked a myriad of detailed factual questions which were precisely the type of questions which would have been asked by the District Attorney before the Grand Jury had the employee not availed himself of his constitutional rights. On the basis of its employee again declining to waive his constitutional rights at this hearing, Dairymen's League, although the low bidder, was declared by the Board "not responsible" and denied the contract to furnish certain City institutions with milk and cream during May 1967.[9]

Similarly, Weissglass was called before a Board of Responsibility to determine whether it was "responsible" so as to receive a contract to deliver milk and cream to City institutions during May 1967. Although Weissglass ap-

8. By its terms, 103-b applies only to corporations in which a witness who refuses to waive immunity is an officer or director and not a mere employee.

9. Dairymen's League subsequently instituted a special proceeding in the New York Courts to review this determination. Its petition was dismissed and that determination has been noticed for appeal.

parently answered all questions put before it, it did not receive that contract. In the case of both Dairymen's League and Weissglass, the contracts went to the next bidder—National Dairy Products Corporation. The Corporation Counsel has attempted to present plaintiffs with a moving target. Each time plaintiffs attacked 103-b, the Corporation Counsel attacked it in a different way and he argued to the three-judge court that he be permitted to do so until he found a way to construe it constitutionally.

While this action was pending, the District Attorney's investigation received wide coverage in the New York City press. In particular, plaintiffs' names and that of their companies were listed as having refused to testify and hence blacklisted under 103-b from receiving state and city contracts. Their names were also coupled with statements by the District Attorney charging numerous violations of law prejudicial to the interests of New York City consumers. No action of any sort has been taken with respect to the District Attorney's flamboyant charges of unsafe milk and bid-rigging on public contracts.

On June 27, 1967, the three-judge court handed down its decision denying plaintiffs' motion for a temporary injunction and for summary judgment. The court stayed this action pending any possible resort to State court proceedings to be instituted by plaintiffs herein and/or their corporations.

In the course of its opinion, the three-judge court referred to two cases, to which none of the instant plaintiffs was a party, then pending before the New York State Court of Appeals—*Gardner* v. *Broderick* and *Matter of George Campbell Painting Corp.* v. *Reid*. Both of these cases were decided on July 7, 1967, after the decision of the three-judge court.

In *Gardner* v. *Broderick*, 20 N.Y. 2d 227 (1967), the Court of Appeals sustained the discharge of a New York

City policeman for refusing to waive immunity pursuant to Section 1123 of the New York City Charter which, in language similar in effect to 103-b, requires the discharge of any City employee who refuses to waive immunity when called before a Grand Jury to testify as to, or to answer any question regarding, official conduct of any officer or employee of the City or of the County.

In *Campbell* v. *Reid*, 20 N.Y. 2d 370 (1967), the Court of Appeals considered the constitutionality of Section 2602 of the New York Public Authorities Law, one of the statutes attacked herein, under which the plaintiff therein had been disqualified from receiving a painting contract from the New York City Housing Authority. The Court of Appeals held that statute to be constitutional simply by citing the *Gardner* case. It went on to hold that the statute barred the plaintiff therein from receiving public contracts although the person who had refused to sign the waiver of immunity had resigned his corporate position prior to his appearance before the Grand Jury. In contrast to the opinion of the three-judge court which stated that plaintiffs had a variety of state remedies available, the New York Court of Appeals held that plaintiff's only state remedy was under Section 2603 of the Public Authorities Law[10] which section presumes that there is some impropriety in refusing to waive one's constitutional prerogative.

Significantly, the plaintiff in *Campbell* was barred from receiving the Housing Authority contract without a hearing of any kind. Thus the Court of Appeals rejected Mr. Lipton's last two interpretations of 103-b and accepted

10. The comparable statute is 103-c reprinted in Appendix B.

his first view that 103-b is an automatic five-year ban from doing business with New York public agencies, and that as such—it is constitutional. Since New York City acted in accordance with "the automatic disqualification" interpretation by disqualifying two companies from April contracts without a hearing and that interpretation has been adopted by the New York Court of Appeals, the question of the constitutionality of 103-b on its face is ripe for determination by this Court.

The Questions Presented Are Substantial

1. Abstention

In brief, plaintiffs asked the District Court to enjoin enforcement of a New York State statute infringing their right not to incriminate themselves protected by the Fifth and Fourteenth Amendments to the Constitution and they demonstrated that this statute has created irreparable injury to themselves directly and indirectly to themselves through their corporations. Despite this, the District Court abstained and told plaintiffs to seek their remedy in State court. Such a decision raises grave questions concerning the entire abstention doctrine and its applicability to such a situation.

A. *The Subsequent History of the Statute.* Since the decision of the District Court, the New York Court of Appeals has construed 103-b by its decision in the *Campbell* case, *supra*. That decision interpreted 103-b as meaning precisely what it said—asserting one's constitutional right against self-incrimination is an absolute bar under that statute to the receipt of any public contracts for a five-year period without any requirement of an administrative hearing and with the banned company's right of re-

view restricted to its limited and patently inadequate rights under section 103-c. If there were any grounds for abstention prior to *Campbell* they evaporated with that decision. The highest court of the State of New York has spoken definitively about the statute's constitutionality and construction and hence there is no further reason for delay in a federal adjudication of the statute's constitutionality as construed by the New York Court of Appeals.

This was the precise holding of the United States Court of Appeals for the Second Circuit (by a panel including Circuit Judge Leonard Moore, one of the judges herein) in *Uniformed Sanitation Men Association* v. *Commissioner of Sanitation* (2nd Cir. Docket No. 31014, September 20, 1967). That case arose out of the discharge of a number of New York City Sanitation Department employees for exercising their rights against self-incrimination. The discharges were made pursuant to section 1123 of the New York City Charter, the very same section involved and construed by the New York Court of Appeals in the *Gardner* case, *supra*. The Second Circuit held that the *Gardner* opinion destroyed the basis for the prior district court decision to abstain and hence went on to decide the case on the merits, stating:

> "The district court abstained from deciding this issue on the ground that the Section should first be construed by the state courts. Cf. *Holland* v. *Hogan*, 67 Civ. 1223, decided June 27, 1967 (statutory three-judge court). After the district court's decision and while the present appeal was pending the New York Court of Appeals decided the case of Gardner v. Broderick, NY2d, NE2d, N.Y.S. 2d —— (1967), the opinion in [sic] which authoritatively construed Section 1123. The *Gardner* case removed any ground there may have been for federal abstention."

If plaintiffs are forced to institute an action in state court, the outcome is now certain and this Court will still ultimately be confronted with the question of that statute's constitutionality. Hence in the language of this Court in *Baggett* v. *Bullitt*, 377 U. S. 360, 375-376 (1964), state construction of 103-b would not "avoid or fundamentally alter the constitutional issue raised in this litigation". Accordingly, the abstention doctrine is no longer applicable (if it ever was) and can only create delay in determining plaintiffs' rights and results in needless expenditure of time, energy and money for all concerned. Similarly since the facts are not in dispute and this Court has the benefit of the views of the district court herein that the statute may be construed constitutionally as well as that of the New York Court of Appeals as to the constitutionality of the statute, nothing would be gained and much time, energy and money would be lost by remanding the case back to the district court.

B. *The Nature of the Right Involved.* We are dealing with plaintiffs' rights against self-incrimination. The rationale for constitutional protection of these rights was set forth by this Court in *Murphy* v. *Waterfront Commission*, 378 U. S. 52, 55 (1964):

> "The privilege against self-incrimination 'registers an important advance in the development of our liberty—"one of the great landmarks in man's struggle to make himself civilized." ' Ullmann v. United States, 350 U. S. 422, 426, 100 L.ed. 511, 518, 76 S. Ct. 497, 53 ALR 2d 1008. It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear

that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load,' 8 Wigmore, Evidence (McNaughton rev, 1961), 317; our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life,' United States v. Grunewald, 233 F2d 556, 581-582 (Frank, J., dissenting), revd 353 U. S. 391, 1 L.ed 2d 931, 77 S.Ct. 963; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.' Quinn v. United States, 349 U. S. 155, 162, 99 L.ed. 964, 972, 75 S.Ct. 668, 51 ALR2d 1157."

The district court opinion raises the question whether federal litigation concerning statutes allegedly impinging upon this fundamental right can simply be shunted to a state court under the abstention doctrine. In earlier cases this Court has held that federal suits to protect fundamental constitutional rights, particularly when brought as this suit was under the Civil Rights Act, 42 U.S.C. Section 1983, are not subject to the abstention doctrine regardless of what remedies are available in the state court. Thus in *Monroe* v. *Pape*, 365 U. S. 167, 183 (1961) this Court stated:

"It is no answer that the State has a law which if enforced would give relief. The *federal remedy* is *supplementary* to the *state remedy*, and the latter *need not be first sought and refused before the fed-*

> *eral one is invoked.* Hence the fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is *no barrier* to the present *suit in the federal court.*" (At page 183) (emphasis added).

Similarly in *McNeese* v. *Board of Education,* 372 U. S. 668, 674 (1963) this Court stated:

> "We have, however, in the present case no underlying issue of state law controlling this litigation. The right alleged is as plainly federal in origin and nature as those vindicated in Brown v. Board of Education, 347 US 483, 98 L ed 873, 74 S Ct 686, 38 A.R. 2d 1180. Nor is the federal right in any way entangled in a skein of state law that must be untangled before the federal case can proceed. For petitioners assert that respondents have been and are depriving them of rights protected by the Fourteenth Amendment. It is immaterial whether respondents' conduct is legal or illegal as a matter of state law. Monroe v. Pape, supra (365 US at 171-187). Such claims are entitled to be adjudicated in the federal courts."

The *McNeese* case quoted with approval *Stapleton* v. *Mitchell,* 60 F. Supp. 51, 55 (D. Kan. 1945):

> "But, where as here, fundamental human liberties are drawn in issue, the Federal courts are a proper forum for the determination of the question whether a state statute trespasses upon an area which the Federal Constitution has set apart as hallowed grounds for expression of democratic ideas. We yet like to believe that wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction

simply because the rights asserted may be adjudicated in some other forum."

See also *Dombrowski* v. *Pfister*, 380 U. S. 479, 485-487 (1965); *Harman* v. *Forssenius*, 380 U. S. 528, 537 (1965).

We submit that the applicability of these precedents to the instant situation should be considered by this Court in order to determine whether the constitutional right against self-incrimination is so fundamental as to preclude applying the abstention doctrine in cases involving it.

C. *The Construction of the Statute.* The District Court opinion frankly admitted that were there no conceivable construction of 103-b which could save it constitutionally, then the abstention doctrine should not be applied. As the District Court opinion subsequently stated, that court considered that it was possible to construe the statute in a constitutional manner.

Thus inherently bound up with the entire abstention question is the question of the constitutionality of 103-b. Before the District Court could have reached its decision to abstain, it first had to decide that the New York courts could arrive at a constitutional interpretation of that statute. What the District Court did, therefore, was to reach a conclusion on the merits, albeit in the guise of a decision to abstain.

Further, 103-b is on its face clear. The sole reason for judicial construction of the statute is the very substantial constitutional doubt raised by the decisions of this Court to be discussed in "2" below. For a federal court to abstain pending state interpretation of the statute under these circumstances becomes a useless and wasteful procedure. All that the state court can do is to guess

what this Court would require in order to save the statute's constitutionality. See *Federal Question Abstention: Justice Frankfurter's Doctrine in An Activist Era*, 80 Harv. L. Rev. 604, 616-617 (1967).

D. *Plaintiffs' Irreparable Injury.* One factor virtually forgotten by the District Court was the irreparable injury which will be suffered by plaintiffs unless and until section 103-b is declared unconstitutional. Some of this injury is readily apparent. Presumptively their corporations are precluded from entering into any contract with the State of New York and its multitudinous local self-governing entities. It is incalculable what business plaintiffs' corporations would have received had they been allowed to bid on the multitudes of contracts available for public bidding in the State of New York. A measure of the seriousness of this damage is the contracts to supply the New York City institutions, each one of which is worth thousands of dollars, which will be coming up month after month for a five-year period and on all of which plaintiffs' corporations will be unable to receive awards.

Just as irreparable is the fact that plaintiffs have been rendered virtually unemployable. If a plaintiff sought to become an officer or director of another corporation, that corporation would be faced with the unhappy dilemma of either not hiring the plaintiff or foregoing state and city business for a five-year period.

To compound plaintiffs' difficulties, their only relief appears to be a speedy adjudication by a federal court. Under New York State law, it is dubious whether a corporation wrongfully deprived of the right to receive a public contract has any remedy for damages against the

public contracting agency. *Matter of Allen* v. *Eberling*, 24 A.D. 2d 594 (1965); *Carol-Ratner Corp.* v. *City Manager of New Rochelle* (Supreme Court, Westchester County, N.Y.L.J., Sept. 14, 1967, p. 20).

Likewise this Court in *Monroe* v. *Pape*, 365 U. S. 167 (1961) has held that the Civil Rights Act does not afford an injured plaintiff the right to receive damages from a city infringing his constitutional rights. Instead all he can receive under that Act is his damages from the individual public officials who effected the denial of his constitutional rights. Thus if plaintiffs are correct in their contention that 103-b is unconstitutional, the only monetary remedy they may have is the right to pursue their claims for damages against a host of civil servants whose ability to pay such damages would be uncertain.

Finally, the invocation of the statute has been coupled with widespread press publicity linking the names of plaintiffs with the extravagant charges of the District Attorney and implying that the exercise of plaintiffs' constitutional rights meant guilt. Indeed the *New York Post* in an editorial even equated the bringing of this action with guilt. Thus in addition to all the other irreparable damage inherent in section 103-b, plaintiffs and their corporations have suffered irreparable injury to their public reputations with incalculable effect upon their businesses and even to their rights to a fair trial in the event the District Attorney ever brings his charges to trial.

This Court has indicated that delay causing irreparable injury to plaintiffs is grounds for not applying the abstention doctrine. *Harman* v. *Forssenius, supra*; *Dombrowski* v. *Pfister, supra*; *Baggett* v. *Bullitt, supra*.

E. *The Current Status of the Abstention Doctrine.* In a number of recent decisions many of which have heretofore been cited, this Court has rejected application of the abstention doctrine and with increasing regularity limited its application. Abstention is now such a limited and restricted doctrine that its continued validity in any case is open to question. A recent comment on this doctrine reached the following conclusion:

> "What is not clear is whether abstention in its truncated state is worth saving. Some say its demise is overdue.
>
> "The question remaining is whether abstention is really useful in those cases standing outside all the exceptions: those non-civil rights, non-vagueness cases where a decision on an unclear issue of state law might obviate the need for a difficult constitutional decision and where the state-law and constitutional issues are not simply different verbalizations of the same concepts. State-court adjudication in such cases might make it unnecessary for either the state or federal courts to reach the constitutional issues, albeit at great additional costs in time and money to the litigants. The price, barring exceptional circumstances, seems a bit high, especially since the Supreme Court's control of its own docket could prevent at least that body from being overwhelmed by what in any case would probably be a minor increase in the number of constitutional decisions. In addition, any contribution abstention makes to federal-state harmony is probably minimal; in fact it could be argued that abstention increases rather than minimizes friction. Even though the Constitution and state law take different approaches to the problem, they still must be reconciled. Since the district court retains jurisdiction, abstention

creates a system in which states must interpret their law under the continuing threat of federal intervention. If the federal court were to move first, the state would at least be warned of the constitutional limits within which it must act before the case reaches its courts. Such clear-cut and immediate exertion of federal power may be less frustrating to the states than the uncertainty abstention engenders. And if, in the particular case, the constitutional issue is so touchy that it should be avoided at all costs, doctrines of ripeness and standing, or an exertion of equitable discretion to dismiss the complaint, would allow the federal court to dispose of the troublesome issues without risk of their returning later in the same form. In addition, abolition of the doctrine would deprive federal trial judges of one means of avoiding decision in unpopular cases, as some no doubt have done. It is impossible to predict whether the Supreme Court will undertake a frontal assault on abstention. But if the doctrine is to be salvaged, either legislation or a clear-cut statement of applicable criteria by the Court is necessary to make it workable in the present activist era." Federal Question Abstention. Justice Frankfurter's Doctrine, In An Activist Era, 80 Harv. L.Rev. 604, 622 (1967).

We submit, therefore, that this case presents an ideal vehicle for this Court to consider whether there is any vitality left to the abstention doctrine whatsoever.

2. The Constitutionality of Section 103-b

Section 103-b allows prosecutors (1) to coerce persons to testify against themselves upon pain of losing the right to do business with any public agency in the State of New York for five years; and (2) to penalize persons availing

themselves of their constitutional rights not to incriminate themselves by depriving them of the right to do business with all New York public agencies for a five-year period. We submit, that such a statute is unconstitutional in the light of this Court's decisions in *Garrity* v. *New Jersey*, 385 U. S. 493 (1967) and *Spevack* v. *Klein*, 385 U. S. 511 (1967). In this connection the District Court recognized that these decisions "have engendered difficult and substantial questions about the constitutionality of Section 103-b" and that such issues "cannot be resolved by resort to the facile but question-begging generalizations that the award of a public contract is a privilege rather than a right or that the state is acting in its proprietary, rather than its sovereign, capacity". These considerations motivated the District Court to apply abstention. We have demonstrated in "1" above why abstention is not a proper answer to the issues raised by this action. Once eliminating abstention as a possible alternative, the District Court opinion becomes a declaration that important constitutional questions meriting decision by this Court are raised in this litigation.

In this connection these issues cannot be avoided or resolved by the strained construction the Corporation Counsel would place upon 103-b. The Corporation Counsel would not make 103-b an automatic bar. Instead, despite the statute's clear language, he would imply a burden of appearing before a Board of Responsibility upon a corporation whose officers and directors exercise their constitutional rights not to incriminate themselves. The experience of Dairymen's League indicates that such a Board of Responsibility is simply the Grand Jury in another guise,

albeit without the power to grant immunity. Here the prosecutor's questions are posed for him by the members of the Board armed with the sanction that if the answers of the witness do not please them or if the witness refuses to answer in full his corporation can be debarred from a contract it would otherwise have received.

But even if we did not have the example of the Dairymen's League before us, such a procedure would still be unconstitutional. First the Acting Commissioner of Purchase own language indicates that what he is doing is giving the persons who exercised their constitutional rights the right to "explain the refusal". In other words the witness is called upon to justify his exercise of rights guaranteed him by the United States Constitution. Thus the City's own choice of language indicates the burden it seeks to impose upon the exercise of constitutional rights. See *Hoffman* v. *United States*, 341 U. S. 479 (1951).

Secondly, Boards of Responsibility, as Mr. Lipton indicated at the oral argument below, are convened only on rare occasions. The Corporation Counsel's interpretation would divide persons seeking to do business with the city into two categories. Those whose officers and directors have chosen to exercise a constitutional right and those who have not (including those who may not even have been asked to do so). Those who have not exercised their constitutional right will presumably be granted contracts for which they are the low bidder. But those whose officers and directors have exercised their constitutional rights will not be given any contract no matter how low their bid unless and until they satisfy a Board of Responsibility that they are responsible bidders. Thus, taking the Corporation Counsel's interpretation in its most fa-

vorable light, he is changing the statute from a declaration that persons availing themselves of constitutional rights *will not* receive public contracts because of that exercise to a statement that persons exercising constitutional rights *perhaps may not* receive public contracts because of the exercise of that right. But, under either interpretation a penalty is being imposed upon persons exercising their constitutional rights which is not imposed upon all others. Consequently, anyone considering whether or not to exercise his constitutional rights against self-incrimination must also consider the possible effect such an exercise might have on his right to receive public contracts.

We submit that such an interpretation does not avoid unconstitutionality under this Court's decision in *Harman* v. *Forssenius*, 380 U. S. 528 (1965). In that case Virginia required persons trying to exercise their 24th Amendment right not to pay a poll tax in a federal election to submit an affidavit of six months' residence. This Court stated in striking down that law that "it need only be shown that it imposes a material requirement solely upon those who refuse to surrender their constitutional right". The Corporation Counsel is imposing the material requirement of satisfying a Board of Responsibility upon those who exercise their constitutional rights while failing to impose any similar requirement on those who either do not choose to avail themselves of such rights or are not faced with such a choice. In the language of *Garrity* this is a manifest attempt to "condition by the exaction of a price" the exercise of "rights of a constitutional stature".

We submit, therefore, that either by its express terms or under the interpretation of either the New York Court of Appeals or the Corporation Counsel, Section 103-b is

still unconstitutional and that in any event, as recognized by the District Court, the question of its constitutionality, in the light of this Court's decisions, certainly raises material and substantial issues for review by this Court.

3. The Issues Raised by the District Attorney's Conduct

Even if we assume *arguendo* that 103-b is constitutional, the case is still not disposed of. The District Attorney, except in three instances which occurred after the institution of this litigation, has failed to indicate to the witnesses before the Grand Jury facts sufficient to indicate that 103-b was applicable. In virtually *all* cases the District Attorney has refused to grant limited waivers restricted to transactions or contracts with public agencies but instead insisted upon waivers totally unlimited in scope. Thus what is in question is not only the constitutionality of 103-b but the conduct of the District Attorney impairing the constitutional rights of witnesses not to incriminate themselves. His conduct finds no protection under the color of a state statute. Even assuming *arguendo* that a state by statute has a right to debar persons from doing business with public agencies, because of their exercise of their constitutional rights, it does not follow that a District Attorney, ignoring the specific language of such a statute, might by himself further and more extensively abrogate such rights by the device of purporting to act under that state statute. We contend that 103-b is unconstitutional. But even more oppressive would be punishment of persons exercising their constitutional rights imposed by the actions of the District Attorney which are not checked either by the limitations contained in the statute or by the opportunity for judicial review.

Although the facts of the District Attorney's overreaching were virtually conceded by the District Attorney at the oral argument and are graphically demonstrated by the Grand Jury minutes submitted to the District Court under seal after the oral argument, the District Court completely failed to discuss this issue.

We submit that if this Court finds 103-b to be constitutional it then must resolve the question of whether the District Attorney can take the constitutional rights of plaintiffs into his own hands without benefit of an authorizing state statutes. Such an issue is in the light of *Spevack* and *Garrity* a novel and important issue of constitutional law.

Conclusion

The appeal herein raises substantial issues requiring plenary consideration by this Court, with briefs on the merits and with oral argument for their resolution.

Dated: New York, New York
September 25, 1967

Respectfully submitted,

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APPENDICES

APPENDIX A

Opinion of the Court Below

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Appearances:

WEIL, GOTSHAL & MANGES, Esqs.
Attorneys for plaintiffs
Ira M. Millstein, Marshall C. Berger, Donald J. Williamson, of Counsel

PAUL, WEISS, RIFKIND, WHARTON & GARRISON, Esqs.
Attorneys for plaintiffs-intervenors Richmond Kotcher, Norton Kotcher, David Gimpel and Jack Sacks
Edward N. Costikyan, Thomas R. Farrell, of Counsel

DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD, Esqs.
Attorneys for plaintiffs-intervenors Michael W. Cammarosano and Edward Brennan and all other officers and employees of the Borden Company
Kent V. Lukingbeal, of Counsel

FRANK S. HOGAN, Esq.
District Attorney of New York County
Attorney for defendants Frank S. Hogan, Samuel Yasgur, et al.
H. Richard Uviller, Samuel Yasgur, Michael Stack, Assistant District Attorneys, of Counsel

Appendix A

J. Lee Rankin, Esq.
Corporation Counsel, City of New York
Attorney for defendant Samuel Adler
Morgan N. Lipton, Vincent Zichello, Assistant Corporation Counsel, of Counsel

Louis J. Lefkowitz, Esq.
Attorney General of the State of New York
Intervenor-Defendant, pro se
Samuel A. Hirshowitz, First Assistant Attorney General, Brenda Soloff, Assistant Attorney General, Karla Moskowitz, Assistant Attorney, of Counsel

Before:

Moore, Circuit Judge, and Ryan and Herlands, District Judges

Herlands, District Judge:

This two-pronged motion by plaintiffs seeking a temporary injunction and a summary judgment for a permanent injunction presents a threshold issue concerning the Court's assumption of jurisdiction and a basic substantive issue concerning the constitutionality of certain state statutes and of the conduct of the defendant county and municipal officers in applying those statutes. The initial question is whether, in the particular circumstances of this case, the Court should invoke the doctrine of abstention and thus defer further proceedings or dismiss the complaint. The second question is whether the challenged

provisions of three New York State statutes,[1] General Municipal Law §103-b, Finance Law §139-b and Public Authorities Law §2602, are constitutional and whether the District Attorney of New York County and his assistants and the Director of Purchase of New York City, under color of enforcing these statutory provisions, have violated, are violating and are threatening to violate plaintiffs' constitutional right against self-incrimination.

1. The relevant portions of the statutes under attack are almost verbatim the same. General Municipal Law §103-b reads:

"§103-b. Disqualification to contract with municipal corporations and fire districts

Any person, who when called before a grand jury to testify concerning any transaction or contract had with the state, any political subdivision thereof, a public authority, or with a public department, agency or official of the state or of any political subdivision thereof or of a public authority, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract, and any firm, partnership or corporation of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any municipal corporation or fire district, or with any public department, agency or official thereof, for goods, work or services, for a period of five years after such refusal or until a disqualification shall be removed pursuant to the provisions of section one hundred three -c of this article.

It shall be the duty of the officer conducting the investigation before the grand jury before which the refusal occurs to send notice of such refusal, together with the names of any firm, partnership or corporation of which the person so refusing is known to be a member, partner, officer or director, to the superintendent of public works of the state of New York and the appropriate departments, agencies and officials of the state, political subdivisions thereof or public authorities with whom the person so refusing and any firm, partnership or corporation of which he is a member, partner, director or officer, is known to have a contract."

Appendix A

For reasons expounded in this opinion, the Court has decided to abstain from assuming jurisdiction and not to pass on the merits of the substantive constitutional questions. However, in the process of deciding whether this is a proper case for the exercise of such discretion as it may justifiably employ in determining whether to abstain, the Court has considered the totality of relevant factors including certain aspects of the substantive questions to the extent that they impinge upon the problem of abstention. While the Court's range of focus for present limited purposes encompasses various features of the basic constitutional questions, the Court has not deemed it necessary to adjudicate those questions.

I.

To place the issues in proper context, it is necessary to make a comprehensive statement of the nature of the proceedings and the parties' factual and legal contentions.

By order to show cause signed by District Judge Bryan on March 30, 1967, plaintiffs brought on a motion for a temporary restraining order, a preliminary injunction, a summary judgment and the convening of a three-judge statutory court under title 28 U.S.C. §§2281, 2284 and the General Rules of the United States District Court for the Southern District of New York, Rule 25. Judge Bryan refused to grant a temporary restraining order when he signed the order to show cause and made it returnable on April 4, 1967.

On April 4 and 11, 1967, District Judge Herlands heard argument on the motion. In a memorandum decision filed

on April 14, 1967, Judge Herlands held that the proceedings "raise a substantial question as to the constitutionality" of the three state statutes and "that plaintiffs' application for an interlocutory and permanent injunction must be heard and determined by a district court of three judges. 28 U.S.C. §§2281, 2284." Plaintiffs' application for a temporary restraining order was denied "for the reason that the evidence does not support a specific finding that specified irreparable damage will result to these plaintiffs if a temporary restraining order is not granted. 28 U.S.C. §2284(3)."

This three-judge court, having been duly designated, held a hearing on May 4, 1967.

On March 30, 1967, when plaintiffs obtained the order to show cause, they filed a complaint against the defendants herein: Frank S. Hogan, District Attorney of New York County, "and each and every assistant district attorney of New York County," and Samuel Adler. The defendant Adler is Director of Purchase of the City of New York.

The action is brought under title 42 U.S.C. §1983, which relevantly provides that every person who, "under color of any statute, * * * of any State * * *, subjects, or causes to be subjected, any citizen of the United States * * * to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The complaint alleges that the court has original jurisdiction by virtue of title 28 U.S.C. §1343 (3) and (4),

which covers actions to "redress the deprivation, under color of any State law, statute, * * *, of any right, privilege or immunity secured by the Constitution of the United States" and to "secure equitable or other relief under any Act of Congress providing for the protection of civil rights."

Two claims are pleaded in the complaint. The first charges that defendants' actions and threatened actions "deprive under color of public office, each plaintiff of, and impair the exercise of, his right not to incriminate himself, which right is secured to him by the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, Section 6 of the New York State Constitution." The second claim is that the three challenged New York State statutes "are unconstitutional under the Fifth and Fourteenth Amendments to the United States Constitution."

The five named plaintiffs are suing "on their own behalf and on behalf of all other persons similarly situated." The complaint contains the conventional allegations for a class action under Fed. R. Civ. P. 23.

The named plaintiffs are: Frohman Holland, Irving Holland, Robert Saunders, Bert Gilbert and Harvey Miller. The first three are respectively treasurer, vice-president and secretary of Holland Farms, Inc. and Hogeman Farms Corp.; Gilbert is president of Trinity Dairy Co., Inc.; and Miller is president of Queensboro Farm Products, Inc. The four abovenamed corporations are stated to be "engaged in the processing, sale and distribution of milk in the New York metropolitan area."

Appendix A

The class on whose behalf plaintiffs have brought this action is described in the complaint as consisting of "all persons who are officers or directors of any corporation, firm, partnership or other business entity which engages, or may engage in any transaction or has or may obtain a contract or award or has submitted or may submit a bid for milk or dairy goods, work or services with the State of New York, any municipal corporation or fire district therein, any public authority therein or any public department, agency or official thereof."

Subsequent to the filing of the complaint the following persons appeared in the action as members of the above class: Jack Sacks, secretary of Eastern Farms Products, Inc.; Richmond Kotcher and Norton Kotcher, respectively secretary and treasurer of Ferndale Farms, Inc.; David Gimpel, president of Gimpel Farms, Inc.; and Edward Brennan and Michael Cammarosano, officers of The Borden Company. The Attorney General of the State of New York, by stipulation, intervened as a party defendant.

We now detail the occurrences precipitating this litigation and the ensuing events, as described in the moving and opposing affidavits.

The Third March 1967 Grand Jury of the County of New York commenced an investigation to determine whether such crimes as conspiracy to prevent competitive bidding on public contracts, extortion, coercion and bribery had been committed in relation to the processing and distribution of milk and milk products during the past two or three years. The district attorney avers that he "has amassed considerable information which shows that a num-

ber of milk processing corporations have agreed to submit rigged milk bids to various governmental agencies. * * * that these corporations have taken milk which has been returned from stores as too old for sale and then repackaged it and delivered it to various governmental agencies including hospitals. * * * that these corporations and certain labor officials have agreed to coerce, threaten and harass the competitors of these milk corporations. These corporations and labor officials have agreed to raise and to fix milk prices. They have threatened and intimidated other milk dealers who balked at their scheme. That pursuant to that investigation over sixty witnesses have been called to testify before the Grand Jury. As a matter of caution, because of the wide spread corruption, practically all witnesses have been asked to sign waivers of immunity before testifying."

In the course of this inquiry, the district attorney called before the grand jury twenty-three individuals who are officers or directors of sixteen different milk processing and distributing corporations that sell and deliver milk and milk products to various governmental agencies.

In an early phase of the investigation, when its scope was broader than public contracts or bids, two witnesses were asked to sign a general waiver of immunity. Upon their refusal to do so, no action was taken by the district attorney with respect to any contracts their companies may have had with the City or State of New York.

However, when the inquiry was narrowed to the subject of municipal and state contracts and possible crimes committed in connection with them, the witnesses, including plaintiffs, were requested by the district attorney to

sign a waiver containing the following language: "That pursuant to Section 103b of the General Municipal Law I hereby waive immunity against any subsequent criminal prosecution for any crimes which my testimony before this Grand Jury may disclose." None of the witnesses signed the waiver.

The district attorney argues that the explicit language of the proffered waiver and the ample opportunity of each witness to consult his attorney—who accompanied him to the grand jury anteroom—both before and during his grand jury appearance with respect to the waiver alerted each witness to the fact that he was going to be interrogated about municipal and state milk contracts.

The plaintiffs claim that, assuming arguendo the constitutionality of General Municipal Law §103-b, the district attorney has applied the statute in an unconstitutional manner by failing to offer them a waiver of immunity limited to specific transactions and contracts with the city and state; and by threatening them that, if they refused to sign a waiver of immunity, they and the corporations of which they were officers or directors would be barred from doing any business with the City and State of New York for a period of five years.

The relevant portion of the minutes of the Third March 1967 Grand Jury made available to us for purposes of this case, pursuant to an appropriate state court order, discloses that each of the five named plaintiffs (who appeared before the grand jury on March 21, 1967), eight other officers and directors of milk companies (who appeared before the grand jury on the same day), two other similar witnesses (who appeared before the grand jury on March

23, 1967), four other similar witnesses (who appeared before the grand jury on dates not indicated) were told by the district attorney that the grand jury was conducting an investigation to determine whether the crimes of conspiracy, coercion, extortion, bribery of a labor union representative, bribery of a public official, and bid-rigging, among other crimes, have been committed in relation to the processing and distribution of milk in the New York City area during the past two or three years; and that, if the witness failed to sign a waiver of immunity pursuant to General Municipal Law §103-b, he and any firm that he represents might be disqualified from doing business with the City and State of New York for a period of five years.

The grand jury minutes also disclose that, in the case of a similar witness who appeared before the grand jury some unspecified time after March 30, 1967 (the date when the action herein was commenced), he was told by the district attorney that the grand jury was investigating the crimes of conspiracy to rig bids on public contracts, extortion, bribery and other violations of the Penal Law relating to public contracts for the sale and purchase of milk products by the City of New York and other government agencies; and that the witness' testimony was desired in relation to that inquiry. In the case of two similar witnesses who appeared before the grand jury on April 13, 1967, they were told by the district attorney that their testimony was sought in connection with the grand jury's investigation into such crimes as conspiracy to prevent competitive bidding on public contracts, bribery, extortion, and other violations of the Penal Law in relation to public con-

tracts that the company of which they were officers had with the City and State of New York.

Following the above-mentioned witnesses' refusal to sign waivers of immunity, the district attorney wrote a letter, dated March 27, 1967, to the Mayor of the City of New York, Honorable John V. Lindsay, reading:

"Re: *People* v. *John Doe, et al*

Dear Mayor Lindsay:

The Third March Grand Jury of this county is presently conducting an investigation to determine whether violations of the penal law have been committed in relation to the processing and distribution of milk and milk products in the New York City Metropolitan area during the past two or three years.

In the course of this investigation, this office has subpoenaed a number of milk dealers who have contracts with City agencies. Purusant to Section 103-b of the General Municipal Law, the standard contract of these agencies requires that contractors doing business with the various City departments sign waivers of immunity before the Grand Jury when called to testify concerning their transactions with the City.

Under Section 103-b this office is required to advise you that the following witnesses have refused to sign, and testify under, waivers of immunity before the New York County Grand Jury:

* * * [Here follow the names of eighteen persons, their corporate positions in fifteen different milk companies, and the companies' addresses.]

A duplicate original of this letter is being sent to Honorable Richard Lewisohn, Commissioner, New York City Department of Purchase, Municipal Building, Room 1924, New York, New York."

Thereafter, by letter dated April 21, 1967, the district attorney advised the municipal Commissioner of Purchase that three additional persons, the officers of two named milk companies, had "refused to sign waivers of immunity pursuant to Section 103-b of the General Municipal Law."

Having subpoenaed the above-indicated total of twenty-one persons representing seventeen different milk companies, the district attorney now moves to dismiss the complaint against him for the asserted reasons, *inter alia*, that the grand jury investigation "insofar as section 103-b of the General Municipal Law is applicable" has been completed; that no additional witnesses are scheduled to be subpoenaed and asked to sign waivers of immunity pursuant to that statute; that he has completed sending notices to other governmental agencies under that statute; that he will do nothing further with respect to this matter; and that the complaint now is moot as to him.

On March 29, 1967, defendant Adler, upon examining the bids for the monthly contracts to supply milk and cream to various municipal institutions during the month of April, ascertained that two of the companies named in the district attorney's letters—Queensboro Farm Products Inc. and Weissglass Gold Seal Dairy Corp.—were low bidders on three items. The low bids of these two companies were disregarded; and, on March 30, 1967, contracts for the month of April for these milk products were awarded to the next lowest bidder, Sealtest, Inc.

It is to be noted that, although their low bids on the April contract were disregarded, Queensboro Farm Prod-

ucts Inc. and Weissglass Gold Seal Dairy Corp. were not expressly declared by the Department of Purchase to be disqualified from doing business with the City of New York. In fact, as will shortly be shown, they were invited by the City to submit bids on the May, 1967 milk contracts.

A brief reference to certain features of the Department of Purchase procedure in awarding milk contracts will impart added significance to the facts of this case.

The Department of Purchase awards contracts for the supplying of milk and milk products to hospitals, correctional institutions, park facilities, children's centers, men's shelters, and youth houses operated by the various agencies and departments of the City of New York. These contracts are awarded on a month-to-month basis. The City of New York has no milk contracts which by their terms are to be performed for any period longer than a month.

Bids for these contracts must be publicly advertised in the *City Record*. In addition, the actual bid forms for purchases are mailed to prospective bidders whose names have been placed on the department's official bidders' list. The method by which names are placed on the bidders' list is prescribed by Intradepartmental Procedure Governing the Department's Relationship with Bidders, section X which provides that the firm seeking to be listed must, *inter alia*,

> "Execute an 'Application for Registration as a Responsible and Eligible Bidder'. This form includes business references and a financial statement.
>
> • • •
>
> Should the data submitted by the applicant provide reasonable grounds for assuming his responsi-

bility, his name will be placed upon the bidders' list. Should independent investigation show that the applicant is not responsible, his name will not be listed."

Bidders' lists contain the firm names and a code number for each firm. Addressograph plates, containing the bidders' code numbers, are used to prepare the envelopes for mailing the bid forms in connection with each particular bid opening. Using the foregoing code number list and addressograph plates for purposes of the May, 1967 milk contracts, the Department of Purchase mailed bid forms to each of the milk companies on the same bidders' list that has been used every month since July 25, 1966. This list included all of the companies whose names had been mentioned by the district attorney in his letters to the Department of Purchase. Evidently, the Department of Purchase continued to invite bids from each of these companies despite the refusal of certain of their officers and directors to sign a waiver of immunity in the course of the grand jury investigation. Incidentally, the milk licenses of these corporations issued by the State Department of Agriculture and the New York City Department of Health have not been suspended or revoked.

Although all were thus invited to submit bids for a May, 1967 milk contract, one (Weissglass Dairies, Inc.) out of the seventeen milk companies listed by the district attorney submitted a bid for such a May, 1967 contract. Borden Farms Products Co., another company listed by the district attorney, submitted a bid for a cheese contract for the month of May, 1967.

Appendix A

The Department of Purchase records indicate that only three (Queensboro Farms, Borden Farms, and Weissglass Dairy) of those seventeen milk companies have submitted bids on municipal milk contracts at any time since October, 1966.

After it was ascertained that Weissglass Dairies, Inc. and Borden Farms Products Co. were low bidders on certain May, 1967 milk products contracts, they were given the opportunity to appear for a hearing before an administrative Board of Responsibility. The broader significance of a Board of Responsibility hearing will be discussed later in this opinion, but, at this point, the fact is noted that Weissglass Dairies, Inc. appeared before the Board of Responsibility and answered all questions. The hearing as to it has not yet been closed. Borden Farms Products Co., however, refused to appear at a Board of Responsibility hearing.

Unlike the municipal milk contracts that are awarded on a month-to-month basis, the milk contracts of the Board of Education of the City of New York are for a one-year period. Three of the milk companies listed by the district attorney have contracts with the Board of Education. Those contracts have not been cancelled despite the fact that their officers refused to sign a waiver of immunity.

We now refer to certain undisputed facts relating to plaintiffs personally as distingiushed from the corporations of which they are officers and directors. At no time material to these proceedings were any of the plaintiffs licensed to engage in the milk business; none of them per-

sonally conducted such business; none of them had any milk contract with the City or State of New York.

The facts just recited have engendered the issue whether plaintiffs, in their personal capacity, have standing to maintain this action. Defendants argue that plaintiffs cannot equate themselves, as individuals, with the corporations with which they are associated; that, inasmuch as plaintiffs are not licensed to engage in the milk business, they cannot and do not have any relationships with the City as bidders or contractors; that neither the challenged statutes nor the criticized district attorney's letters to governmental purchasing agencies nor the actions of such purchasing agencies can operate as against any of the plaintiffs personally; that this action by plaintiffs "is a transparent subterfuge" by "nominal plaintiffs who have no contracts with the City" really coming to the rescue of corporations, the "real parties in interest," who "have no privilege against self-incrimination and are not in a position to claim that anyone has violated their privilege"; and that, therefore, plaintiffs do not have standing to challenge the constitutionality of the statutes or defendants' acts.

On the other hand, plaintiffs claim that, by operation of the self-executing provisions of the statutes, each of them has been personally disqualified from doing any business whatsoever with the City or State for five years; that, because plaintiffs are officers, directors and stockholders, and their personal rights of employment and property are so closely interrelated with their respective corporation's fate, the disqualification of the corporation from doing any

business with the City and State for five years should be viewed as a direct and substantial invasion of their own personal rights flowing from their having invoked their personal constitutional privilege; and that, therefore, plaintiffs have standing to maintain this action.

Plaintiffs' argument premised on a coalescence of personal and corporate rights and injuries is illustrated by the following amorphous definitions by plaintiffs of the class on whose behalf this action is brought: "any milk company dealer which sells milk to the City of New York whose officers and directors could be called to testify" [Transcript of argument, May 4, 1967, p. 66]; and "anybody in the milk business who could possibly bid on a city or state contract * * * even if they are not on a Section 103-b notice * * * and even if they haven't been called" as witnesses [*id.* at 66-67]. A similar blending of the individuals and the corporations is evidenced by plaintiffs' request for an order which "includes a directive that the defendants and others be precluded from refusing to honor bids submitted by any member of the class on behalf of whom this action has been commenced, such class including officers of the fifteen companies which have been blacklisted and disqualified from public bidding." [Moving affidavit of Donald J. Williamson, sworn to April 7, 1967, p. 12.]

We have already alluded to the facts that the City has continued to invite monthly milk contract bids from the companies listed by the district attorney; that the Board of Education has not cancelled its one-year contracts with the companies likewise listed by the district attorney; and

that none of the listed companies has been declared in so many words by any governmental agency to be disqualified from doing business with the City or State.

In addition to the foregoing facts that may be taken as reflecting current governmental attitude and policy toward the listed companies, defendants emphasize that specific efforts are being made to set up administrative procedures that will, hopefully, obviate plaintiffs' constitutional objections and satisfy the criteria suggested by recent Supreme Court decisions. We shall now describe the steps being taken by the City toward that goal.

After the low bids by two companies for April, 1967 milk contracts had been disregarded by the Department of Purchase on or about March 30, 1967 because their names were on the district attorney's list, the Commissioner of Purchase apparently reviewed the situation, rethought the procedure, and decided "that he was not to disqualify bidders simply because they refused to sign the waiver of immunity under 103(b), that they were to be accorded a hearing first." [Transcript of Argument, May 4, 1967, p. 110.] What was done was to utilize the standing Board of Responsibility procedure with respect to the companies whose names had been listed by the district attorney when their officers or directors refused to sign a waiver of immunity. These measures are exemplified by the procedure set up by Commissioner of Purchase Lewisohn; and a superseding procedure prescribed by Commissioner Lewisohn's successor, Acting Commissioner Gersten.

The following is Commissioner Lewisohn's description of his procedure:

"4. I have directed Samuel Adler [Director of Purchase] that, in the event any of the persons or corporations listed in the notice of refusal heretofore received from the District Attorney, or in any future notices of refusal, are low bidders on any city contracts, before any such persons or corporations be disqualified pursuant to §103-b of the General Municipal Law, such persons be given an opportunity to explain such refusal to sign a waiver of immunity, before the Board of Responsibility.

5. I shall request a meeting of the Board of Responsibility in accordance with Board of Estimate resolution adopted on June 30, 1949 (Cal. No. 318-A), §5(c) which reads in part as follows:

> '§5(c) A bidder shall be declared disqualified because not responsible only upon the determination of a Board to consist of the Comptroller, the Corporation Counsel and the head of the agency making the award, or their authorized representatives. Such Board shall meet upon the call of the head of the agency making the award. The Board shall investigate and pass upon the responsibility of the bidder. The records and facilities of all agencies shall be available for the use of the Board. The findings of the Board shall be filed by the head of the agency making the award with the Comptroller and the Treasurer.'

6. Following such a hearing, the Board of Responsibility will make its determination as to the qualification of such persons or corporations to receive awards of City contracts in accordance with §103-b of the General Municipal Law." [Opposing affidavit of Richard Lewisohn, sworn to April 7, 1967.]

Appendix A

Commissioner Lewisohn having resigned on April 3, 1967 and Marvin Gersten having become Acting Commissioner of Purchase, Commissioner Gersten expressly superseded the procedures established by his predecessor and issued instead the following instructions to the Director of Purchase:

"(a) None of the persons or corporations listed in the notices of refusal heretofore received, nor any person or corporation listed in any future notice of refusal, is to be disqualified from receiving city contracts for five years automatically upon receipt of such notice of refusal, nor shall such person or corporation be denied the award of any city contract solely by reason of the fact that his or its name appears in a notice of refusal.

(b) Such persons or corporations listed in a notice of refusal shall be accorded a hearing at which an opportunity will be given to explain the refusal to waive immunity or to answer a question before the grand jury, investigating public contracts.

(c) Such hearings will not be held pending the determination by this court of the issues involved in the instant litigation.

(d) In the event such persons or corporations listed in a notice of refusal shall be a low bidder on a city contract, a meeting of the Board of Responsibility shall be convened in accordance with §5(c) of the Resolution of the Board of Estimate adopted on June 30, 1949 (Cal. No. 318-A) which provides as follows:

* * * [Here follows the text of §5(c), as previously quoted in the Lewisohn affidavit, *supra*.]

* * *" [Opposing affidavit of Marvin Gersten, sworn to May 1, 1967.]

The major distinction between the Lewisohn and Gersten procedures may be described as follows: Under the former procedure, when a person or corporation listed in a notice of refusal to waive immunity is a low bidder on any city contract, the person refusing to waive is given an opportunity to explain that refusal to the Board of Responsibility; and the Board determines whether such person or corporation is qualified to receive awards of City contracts "in accordance with §103-b of the General Municipal Law." Under the latter procedure, a person or corporation listed in any notice of refusal to waive immunity or to testify is not to be disqualified from receiving city contracts nor to be denied the award of any city contract solely because his or its name appears in a notice of refusal; but such person or corporation is to be accorded a hearing before the Board of Responsibility at which an opportunity is to be given to explain the refusal to waive immunity or to testify before the grand jury. Presumably the Board then determines whether such person or corporation is a responsible bidder. Defendants state that hearings under the Gersten procedure with respect to corporations listed by the district attorney will not be held until this court decides the present case.

However, some light on how the procedure actually works out is shed by the hearings conducted by the Board of Responsibility on April 28, 1967 in the matter of the bid

of Dairymen's League Cooperative Association, Inc. (hereinafter Dairymen's League).

Dairymen's League submitted a bid on April 21, 1967 for the May contract to supply milk and cream to certain municipal institutions. A rider attached to the bid stated that certain employees of the company had refused to sign waivers of immunity before the grand jury. The Board of Responsibility was convened to pass upon the responsibility of Dairymen's League as the low bidder on the particular May contract.

At the hearing, the transcript of which runs to 76 pages, Dairymen's League was represented by counsel. Upon counsel's advice, the witness (who was metropolitan district manager but not an officer or director of the company) declined to answer such questions as whether the witness had discussed milk prices with any other milk dealers; whether he had discussed customer allocation with other milk dealers or with labor union officials; whether he had met with certain named competitors and named labor union officials; whether bids submitted by the witness had been arrived at independently, without collusion or consultation with competitors; whether bids submitted by the witness in 1966 had been disclosed to other milk companies prior to their submission to the City.

Counsel for Dairymen's League, in explaining why he had instructed the witness to refuse to answer these questions took the position that these questions did not bear upon the issue of the responsibility of Dairymen's League as a bidder; and that the questions invaded the constitutional rights of the witness and the corporation. The City's

contrary view was that answers to the questions were relevant to the moral worth and integrity of the corporation, a factor materially related to its responsibility as a bidder and having nothing to do with the Fifth Amendment or General Municipal Law §103-b; and that the circumstances —that an employee of the company had declined to sign a waiver of immunity before the grand jury and to answer questions before the Board of Responsibility and that the company had failed to produce before the Board of Responsibility anyone with personal knowledge of the facts to admit or deny it had acted collusively—raised legitimate doubts concerning the company's responsibility which the City was entitled to have resolved by pertinent evidence from the company in determining whether the contract should be awarded to the company.

On April 28, 1967, the Board of Responsibility setting forth its findings in a six-page decision, declared that the Dairymen's League was not a responsible bidder and disqualified it for the May, 1967 contract. This determination was sustained by the New York State Supreme Court on June 13, 1967. *In Re Dairymen's League Cooperative Ass'n, Inc.*, N.Y.L.J., June 13, 1967, p. 16, col. 1-2 (N. Y. County Sup. Ct., Sp. T., Part I).

In the proceedings before us, plaintiffs dispute the validity of the fundamental concept implicit in the technique of a Board of Responsibility hearing when it is employed in a situation where a corporation's officer, director or employee has invoked his personal Fifth Amendment privilege or where the corporation has failed to produce representatives who are willing to answer the City's relevant ques-

tions about the corporation's qualifications as a bidder. The gist of plaintiffs' argument is that the corporation's officer, director or employee may not be called upon to explain to the City why he has claimed his Fifth Amendment privilege or refused to waive it before the grand jury; that his assertion of that privilege cannot be visited with sanctions against him or his company; and that, in the absence of some affirmative independent proof of wrongdoing adduced by the City, the refusal of the questioned bidder to supply information about itself and its activities —which refusal is manifested by the invocation by the corporation's officer, director or employee of his Fifth Amendment privilege—cannot serve as the predicate either for disqualifying the company and the particular officer, director or employee or for rejecting the company's low bid for a specific contract.

Defendants do not rely exclusively upon the procedure of a Board of Responsibility hearing as the means to avert or defeat plaintiffs' attack in this Court upon General Municipal Law §103-b. Defendants' other claims, in summary form, are:

(1) Section 103-b is constitutional. It represents a reasonable means to implement state and municipal policy for the protection of the public by enabling the state and local governments to insure themselves of responsible bidders. Recent Supreme Court decisions interpreting the Fifth Amendment privilege have involved materially different factual situations and legal issues.

(2) General Municipal Law §103-c—providing for a special proceeding in the State Supreme Court whereby the

court may, in the public interest, discontinue the disqualification under §103-b—is a State remedy available to persons such as plaintiffs herein and their corporations and should be resorted to before commencing a federal action.

(3) The constitutionality of Section 103-b may soon be adjudicated by the New York State Court of Appeals in a case that was submitted to it on May 15, 1967 and now *sub judice, Matter of George Campbell Painting Corp.* v. *Reid, infra.*

(4) The constitutionality of New York City Charter §1123—providing for the dismissal of a municipal employee who refuses to sign a waiver of immunity or to testify in an inquiry into his official conduct—as applied in conjunction with a departmental hearing procedure that affords the employee an opportunity to explain his stand, may soon be adjudicated by the New York State Court of Appeals in a case that was argued before it on May 15, 1967 and now *sub judice, Matter of Gardner* v. *Murphy, infra.*

(5) New York CPLR Article 78 enables plaintiffs to institute a special proceeding in the New York State Supreme Court whereby they can expeditiously test the constitutionality of the challenged statutes.

Plaintiffs' position with respect to all of the foregoing contentions is that Section 103-b is unconstitutional on its face and also as applied; that none of the hearing procedures suggested by defendants can cure Section 103-b of its fatal constitutional infirmity of imposing a burden or consequences upon a person for having invoked his constitutional privilege; that plaintiffs are being exposed to im-

mediate, direct and irreparable injuries for which there is no adequate State remedy; and that this Court should assume jurisdiction and grant the prayed for relief.

II.

The reasons more fully articulated in the course of this opinion have convinced us that the uncertain and shifting factual and legal background of the present action requires us to abstain from passing judgment on the merits of plaintiffs' motions. While our decision is posited squarely on the doctrine of abstention, we point out that salient questions pertinent to the standing of the plaintiffs, the finality of the challenged government action, and the ripeness of the controversy are inextricably interrelated with the structural elements shaping our determination. *Cf. Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 150-157 (1951) (concurring opinion of Frankfurter, J.).

The Supreme Court first expressed its conception of the doctrine of abstention as a restraint of judicial authority grounded in the sound discretion of an equity court in *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496 (1941).[2] Under the rationale there expounded, federal court abstention is permissible—indeed sometimes required[3]—when a substantial federal constitutional issue

2. There are other classes of abstention cases apart from the *Pullman*-type. See Wright, Federal Courts, §52 at pp. 172-77 (1963); Note, Abstention from the Exercise of Federal Jurisdiction, 59 Colum. L. Rev. 749, 757-66 (1959); see generally Barron & Holtzoff, Federal Practice and Procedure §64 (Wright Ed. 1960).

3. See, *e.g.*, *Martin* v. *Creasy*, 360 U. S. 219 (1959); *Harrison* v. *NAACP*, 360 U. S. 167 (1959).

might be avoided by a definitive ruling upon an unsettled preliminary question of state law, provided that ample means exist whereby such a ruling may be obtained in the state courts.

Woven into the fabric of the policies implicit in this criterion was an expressed desire to avoid the "needless friction" which a "premature constitutional adjudication" would work upon federal-state relations. Moreover, the Supreme Court paused to note that the constitutional issue there raised—involving a claim of racial discrimination—"touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open." 312 U. S. at 498.[4]

Although the Supreme Court has repeatedly recognized that the question of abstention must be answered on a case-by-case basis,[5] recent decisions seem to have modified the applicable criteria, tending, in general, to narrow the scope of the doctrine. While it occasionally had been suggested that federal courts ought, as a matter of comity, to defer

4. Interestingly, it is now believed that in cases involving an alleged deprivation of constitutional rights based on racial grounds, the federal courts should be most reluctant to abstain. *Cf. McNeese* v. *Board of Education*, 373 U. S. 668 (1963). It has been suggested that there is a strong national interest in providing a federal forum for such claims, perhaps based in part on a fear of state court nullification, prejudice or delay. See American Law Institute Study of the Division of Jurisdiction Between State and Federal Courts, proposed 28 U.S.C. §1371(g) and Commentary pp. 172-73 (Tent. Draft No. 5 1967); Note, Federal Question Abstention: Justice Frankfurter's Doctrine in an Activist Era, 80 Harv. L. Rev. 604, 607-11 (1967); Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law & Contemp. Prob. 216, 230 (1948).

5. See, *e.g.*, *Baggett* v. *Bullett*, 377 U. S. 360, 375 (1964).

to state tribunals whenever the validity of state action is drawn in question under the federal constitution, it is now quite clear that a federal court may properly abstain only when the underlying state law is uncertain. *Harman* v. *Forssenius*, 380 U. S. 528, 534-36 (1965); *Davis* v. *Mann*, 377 U. S. 678 (1964); *County of Allegheny* v. *Frank Mashuda Co.*, 360 U. S. 185 (1959).[6] Moreover, that uncertainty must be material to the constitutional question. Where the doubt or ambiguity could not affect the constitutional adjudication, or where no possible interpretation could save the state law, abstention would not be appropriate. *Harman* v. *Forssenius, supra*; *McNeese* v. *Board of Education*, 373 U. S. 668 (1963).

On the other hand, the criterion pertaining to the possible disposition of the federal constitutional issue has been somewhat broadened. While *Pullman* itself presented the possibility of avoiding altogether the constitutional question, the subsequent course of decisions indicates that abstention may be justified if the question might be "presented in a different posture" by the determination of state law, *County of Allegheny* v. *Frank Mashuda Co.*, 360 U. S. 185, 189 (1959), or if the state law adjudication might "materially change the nature of the problem." *Harrison* v. *NAACP*, 360 U. S. 167, 177 (1959).

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6. The requirement of uncertainty of state law is perhaps less rigorously applied where the plaintiff is seeking to enjoin a potential or actual state criminal prosecution. These cases involve considerations which go beyond those which are pertinent in a case of the *Pullman* variety. See, *e.g.*, *Fenster* v. *Leary*, 264 F. Supp. 153 (1967), *aff'd per curiam*, 386 U. S. 10 (1967); *Douglas* v. *City of Jeannette*, 319 U. S. 157 (1943).

Appendix A

As phrased most recently in *Harman* v. *Forssenius, supra,* the test is whether "resolution of the federal constitutional question is dependent upon, or may be materially altered by, the determination of an uncertain issue of state law." 380 U. S. at 534.

Postponing the exercise of jurisdiction would seem to be least acceptable in suits involving an alleged abridgment of First Amendment rights or of voting rights. When state law is attacked on its face on vagueness grounds under the First Amendment, the overriding concern has been the "transcendent value to all society" of free expression. *Dombrowski* v. *Pfister,* 380 U. S. 479, 486 (1965); *Baggett* v. *Bullett,* 377 U. S. 360 (1964). *But cf. Zwickler* v. *Koota,* 261 F. Supp. 985 (E.D.N.Y. 1966), *prob. jurisd. noted,* 386 U. S. 906 (1967).

Likewise, in cases affecting voting rights, the societal interest in having an immediate adjudication of a claimed impairment of the democratic process has overshadowed other policies. *Harman* v. *Forssenius,* 380 U. S. 528, 537 (1965); *Davis* v. *Mann,* 377 U. S. 678 (1964).

The posture of the plaintiff or plaintiffs in relation to the challenged state action represents another factor to be evaluated. For example, when contemplated state action may have varying effects upon different plaintiffs, the Supreme Court has reversed a district court for failing to abstain. *Martin* v. *Creasy,* 360 U. S. 219, 224-25 (1959). By contrast, a declination to abstain was approved when the ruling on the federal constitutional issue would not disrupt an entire regulatory scheme, but merely determine the con-

stitutionality of its application solely to a particular, narrow factual situation. *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324, 328-29 (1964).

Abstention is not favored when there is evidence of bad faith in the enforcement of questionable state law, *Dombrowski* v. *Pfister*, 380 U. S. 479, 489-90 (1965), or when there has been seemingly interminable delay in state proceedings, *Griffin* v. *County School Board*, 377 U. S. 218 (1964), or federal proceedings. *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324 (1964).

Finally, the nature and extent of the alleged injury and the availability and relative effectiveness of any state court remedy remain weighty factors in determining the propriety of abstention. *Compare Martin* v. *Creasy*, 360 U. S. 219 (1959), *with McNeese* v. *Board of Education*, 373 U. S. 668 (1963).

Analyzing the record before us in light of the criteria and guidelines just discussed, we view this as a classic case for invoking the doctrine of abstention.

Beyond question, recent innovative developments under the Fifth and Fourteenth Amendments have engendered difficult and substantial questions about the constitutionality of Section 103-b of the New York General Municipal Law and, at least by analogy, the cognate provisions of the Public Authorities Law and the State Finance Law. *Spevack* v. *Klein*, 385 U. S. 511 (1967); *Garrity* v. *State of New Jersey*, 385 U. S. 493 (1967); *Slochower* v. *Board of Higher Education*, 350 U. S. 551 (1956). *But see United States ex rel. Liano* v. *Warden of Wallkill Prison*, 246 F.

Supp. 72, 92-100 (S.D.N.Y. 1965), *aff'd per curiam*, 355 F.2d 208 (2d Cir. 1966).[7]

These issues cannot be resolved by resort to the facile but question-begging generalizations that the award of a public contract is a privilege rather than a right or that the state is acting in its proprietary, rather than its sovereign, capacity. *Cf. Thorpe* v. *Housing Authority*, —— U. S. —— (April 17, 1967). Broadly worded principles as expressed in recent constitutional decisions in the area of self-incrimination and due process may arguably be interpreted as competing here with the important governmental policies that led to the enactment of the remedial legislation now sought to be invalidated by the plaintiffs on constitutional grounds. The demonstrated need to protect the public fisc against theft through collusive bidding on public contracts and the manifest desirability of awarding public contracts only to those possessing certain minimal qualifi-

7. While not intimating any opinion as to the merits of the basic constitutional questions raised herein, we should note that despite broadly worded statements in the majority opinion in *Garrity* v. *New Jersey, supra*, and the plurality opinion in *Spevack* v. *Solomon, supra*, at least a majority of the Supreme Court seem to entertain the view that a public employee may be dismissed for his failure to answer questions narrowly addressed to his performance of public duties. This question, however, was not actually decided in either of the cited cases. Also remaining unresolved under a specific reservation in *Spevack* is the question of the constitutionality of a license revocation based on a failure to produce records required to be kept under state law to facilitate reasonable supervision of state licensees.

In terms of abstract analysis, the public contractor may fall somewhere between the state licensee (such as the attorney in *Spevack*), whose license cannot be revoked for refusing to testify, and the public employee, who possibly may be discharged for remaining silent as to certain matters. Analysis also suggests that there may be material factors that realistically distinguish the public contractor from both the state licensee and the public employee.

cations of moral worth and responsibility constitute highly significant state interests that are the raison d' être of the challenged statutes. Similarly, it would be difficult to gainsay the reasonableness of the state's effort to impose legislatively upon those with whom it does business a continuing duty of candor and disclosure concerning their transactions with the state.[8]

We recognize that the existence of significant underlying state policies, by itself, cannot serve to validate the means chosen to effectuate those policies. Like all forms of state action, this legislation must comport with applicable constitutional criteria. But before this Court could reach the constitutional issues which have been raised here, we would have to know how the statutes in question are to be construed.

While Section 103-b, on its face, appears to be self-executing, we cannot agree that it is not fairly subject to various other interpretations. A closely similar statute applicable to public employees has been interpreted by lower state courts to require a hearing. *Matter of Gardner* v. *Murphy*, 46 Misc. 2d 728 (Sup. Ct. N.Y. Cty. 1965), *aff'd without opinion*, App. Div., 1st Dep't, N.Y.L.J., Feb. 10, 1967; *Matter of Koutnik* v. *Murphy*, 25 App. Div. 2d 197 (1st Dep't 1966); *Matter of Conlon* v. *Murphy*, 24 App. Div. 2d 737 (1st Dep't 1965). See also New York State Temporary Commission on the Constitutional Convention, Individual Liberties, the Administration of Criminal Justice,

8. That a number of jurisdictions have enacted laws similar to the New York legislation bears testimony to the importance of the governmental interests involved. See *United States ex rel. Liano* v. *Warden of Wallkill Prison*, 246 F. Supp. 72, 92 (1965); Wigmore, Evidence §2272 n. 18 (McNaughton Ed. 1961).

pp. 200-210 (1967). The *Gardner* case is presently *sub judice* in the New York Court of Appeals. Also *sub judice* there are two companion cases involving the termination of a public contract—based on a refusal to waive immunity—under Section 2602 of the Public Authorities Law. *Matter of George Campbell Painting Corp.* v. *Reid,* Sup. Ct., N.Y. Cty., N.Y.L.J., p. 18, Dec. 6, 1965, *aff'd without opinion,* App. Div., 1st Dep't, N.Y.L.J., p. 16, Nov. 4, 1966; *George Campbell Painting Corp.* v. *Reid,* No. 247/1966, Sup. Ct., N.Y. Cty., March 21, 1966, *modified,* App. Div., 1st Dep't, N.Y.L.J., p. 16, Nov. 4, 1966. While constitutional objections virtually identical to those raised here have been argued in *Campbell,* there is, of course, no way of knowing whether the Court of Appeals will reach those issues.[9]

In the present case, between the filing of the order convening the three-judge court and the hearing of these motions,[10] the Acting Commissioner of Purchase of the City of New York issued instructions to defendant Samuel Adler, Director of Purchase of the City of New York, concerning the procedures to be followed in regard to persons and corporations listed in notices of refusal to waive immunity or to testify sent by defendant Frank S. Hogan, District Attorney for New York County. Those instructions provide that any person or corporation named in a

9. There is a preliminary question in *Campbell* whether the statute was properly invoked against the corporation, in light of the fact that the individual who refused to waive immunity stepped down from his position as an officer to a position as an employee before receiving the grand jury subpoena.

10. *Cf. Thorpe* v. *Housing Authority,* —— U. S. —— (April 17, 1967) (change in applicable administrative procedure after writ of certiorari granted). *But cf. Keyeshian* v. *Board of Regents,* 385 U. S. 589, 596 (1967) (change in procedure did not affect constitutional claim).

notice shall be afforded an opportunity, at a hearing, to explain the refusal to waive immunity or testify. Interim procedures also were instituted pending a determination by this Court.

At this juncture, we can only speculate as to the final form of the proposed hearing procedure. We are precluded from giving an advisory opinion as to the constitutionality of any particular procedure which might be adopted. All that can and should be said by us at this time is that state law seems far from "certain"; and we see no basis for a blanket ruling that no procedure which reasonably might be adopted could satisfy present constitutional doctrine.[11]

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11. The fashioning of new administrative hearing procedures by the municipal Department of Purchase and the availability of other remedies under existing State law are not formalistic matters, like medievalisms, of merely saying the "right words * * * without slip or trip." Maitland, Old English Law, reprinted in The Maitland Reader (1957) 88. Whatever the ultimate shape of such hearing and remedial procedures, they pose the challenging question whether a constitutionally valid distinction can be found between, on the one hand, a personal privilege of silence and, on the other hand, a possible duty of disclosure toward the state sought to be imposed upon a contractor when he enters into a public contract. A question of such importance should not be determined on the basis of an unfinished record.

Whether the sweeping generalization—that no adverse consequence whatsoever can be attached to the invocation of the Fifth Amendment privilege—is an untouchable premise without boundaries is a proposition that presents problems of delineation when sought to be applied to concrete situations. Broadly worded constitutional pronouncements are obvious hazards to those who, in dealing with hard specifics, must locate the line where the rhetoric of exposition merges into the reality of decision.

Moreover, while the present plaintiffs—individuals called to testify before the grand jury—have stressed the pure self-incrimination aspects of the constitutional problem, there also may well be pertinent procedural and substantive due process issues. These issues cannot be dealt with squarely until the precise nature of the state's administrative process is known.

This is a period of rapid constitutional evolution. There is bound to be an occasional gap between, on the one hand, the criteria established by the most recent Supreme Court decisions, and, on the other hand, existing interpretation of state constitutions, statutes and administrative regulations. Unless its power is used with a sensitive awareness of this inevitable problem, a federal court, by premature intervention, may stifle a state's efforts to interpret its laws so as to bring itself into compliance with newly promulgated constitutional guidelines. Common sense strongly suggests that the state courts be afforded a fair opportunity to pass on the constitutional objections to state law which have been generated by a dynamic constitutionalism. *Cf. Government and Civic Employees Organizing Committee* v. *Windsor*, 353 U. S. 364, 366-67 (1957).

In such circumstances, the logic of the doctrine of abstention is most persuasive. Today, as in the past, the states and their municipalities can serve as laboratories in which to develop methods of public administration that will effectuate state policies within the framework of evolving constitutional principles. A federal court should not prematurely abort this process of accommodation unless urgent countervailing considerations are present.

We face no such considerations here. The facts and circumstances surrounding the grand jury appearances do not constitute injuries of a kind requiring us to intervene before state action comes to rest. *Cf. Fenster* v. *Leary*, 264 F. Supp. 153 (S.D.N.Y. 1966), *aff'd per curiam*, 386 U. S. 10 (1967). Moreover, ample, effective and speedy procedures are available in the state courts to challenge a

disqualification from bidding—or other administrative action—before irreparable injury occurs. When, as, and if the state proceeds to take some action predicated on the facts alleged herein, those affected may seek review of such action in the state courts.

We cannot say which particular avenue of state court relief would be most efficacious. That is in the realm of legal tactic and strategy for counsel to consider in light of state procedural law. However, we do note that Section 103-c of the General Municipal Law appears to provide an accelerated procedure for review of a disqualification based on a refusal to waive immunity or testify. Alternatively, review of adverse official action would seem to be available under Article 78 of the Civil Practice Law and Rules. Finally, a plenary suit for injunctive and/or declaratory relief may be prosecuted in the state courts, perhaps even before any further governmental action has occurred. *Cf. Fenster* v. *Leary, supra.*

One other point deserves our comment. It has been argued here that the individual plaintiffs lack standing to challenge the constitutionality of the state statutes because none are licensed milk dealers. At most, it is said, they may suffer only consequential harm if the corporations of which they are officers and stockholders are disqualified from bidding on public contracts. Conversely, it has been suggested that, if the corporations with which plaintiffs are associated were the litigants, they would be faced with the contention that a corporation does not have a privilege against self-incrimination and may not claim the personal privilege of its officers or stockholders.

We do not believe that constitutional rights can be impaled on the horns of such a dilemma. The "rule of practice" which bars a litigant—even one who has suffered a "direct substantial injury"—from asserting the constitutional rights of others is not applicable when "outweighed by the need to protect * * * fundamental rights. * * *" *Barrows* v. *Jackson*, 346 U. S. 249, 255-58 (1953). See, *e.g.*, *Joint Anti Fascist Refugee Comm.* v. *McGrath*, 341 U .S. 123, 149-154 (1951); *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925); *Truax* v. *Raich*, 239 U. S. 33 (1915). *Cf. Communist Party* v. *United States*, —— F.2d —— (D.C. Cir. March 3, 1967).

If the state attaches consequences to the claim of the privilege against self-incrimination, and the consequences are sufficiently severe and immediate so that the individual's constitutional right has been violated, that right may be championed by another whose injury flows directly from the constitutional deprivation. Indeed, consideration of the personal right may become essential should its alleged impairment result in a denial of due process to the party (here, possibly, the corporation) who may suffer an immediate economic harm. *Cf. Pierce* v. *Society of Sisters*, *supra*; *Truax* v. *Raich*, *supra*.

While we recognize that, as an abstract proposition, a federal court may be the most appropriate forum for the adjudication of federal consitutional claims, overwhelming countervailing considerations on the present record require us to stay our hand. Substantial constitutional issues have been posed concerning the validity of presently uncertain state law; governmental action based on that state law

affecting the plaintiffs here is far from final; ample and effective means appear to be available to challenge that action in the state courts when it becomes final and perhaps earlier; and, lastly, the claimed violations of federal constitutional rights can be raised in the state court proceedings or, if necessary, upon ultimate review by the United States Supreme Court.[12]

Plaintiffs' motion for a preliminary injunction and for summary judgment is hereby denied. The action is stayed pending resort to state court proceedings by the plaintiffs and/or their corporations, as they may be advised.

So ordered.

Dated: New York, N. Y., June 27, 1967.

LEONARD P. MOORE

LEONARD P. MOORE
United States Circuit Judge

Holland v. Hogan (67 Civ. 1223)

[Concurrence tab attached]

SYLVESTER J. RYAN
United States District Judge

WILLIAM B. HERLANDS

WILLIAM B. HERLANDS
United States District Judge

12. It may be noted that the criteria we employ encompass those enumerated in American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts, proposed 28 U.S.C. §1371(c) (Tent. Draft No. 5 1967).

APPENDIX B

Relevant Constitutional and Statutory Provisions

Fifth Amendment to the United States Constitution

"No person * * * shall be compelled in a criminal case to be a witness against himself * * *"

Fourteenth Amendment to the United States Constitution

"* * * nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

---

42 U.S.C. §1983, R.S. §1979

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Appendix B

§103-b of the General Municipal Law of New York State

Disqualification to contract with municipal corporations and fire districts

Any person who, when called before a grand jury to testify concerning any transaction or contract had with the state, any political subdivision thereof, a public authority, or with a public department, agency or official of the state or of any political subdivision thereof or of a public authority, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract, and any firm, partnership or corporation of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any municipal corporation or fire district, or with any public department, agency or official thereof, for goods, work or services, for a period of five years after such refusal or until a disqualification shall be removed pursuant to the provisions of section one hundred three-c of this article.

It shall be the duty of the officer conducting the investigation before the grand jury before which the refusal occurs to send notice of such refusal, together with the names of any firm, partnership or corporation of which the person so refusing is known to be a member, partner, officer or director, to the superintendent of public works of the state of New York and the appropriate departments, agencies and officials of the state, political subdivisions thereof or public authorities with whom the person so re-

fusing and any firm, partnership or corporation of which he is a member, partner, director or officer, is known to have a contract. Added L.1959, c. 605, §2; amended L.1960, c. 94, eff. Sept. 1, 1960; L.1960, c. 606, §3, eff. April 18, 1960.

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§103-c of the General Municipal Law

Removal of disqualification of public contractors by petition

1. Any firm, partnership or corporation which has become subject to the cancellation or termination of a contract or disqualification to contract on account of the refusal of a member, partner, director or officer thereof to waive immunity when called to testify, as provided in sections one hundred three-a and one hundred three-b of this article, may, upon ten days' notice to the attorney general and to the officer who conducted the investigation before the grand jury in which the refusal occurred, commence a special proceeding at a special term of the supreme court held within the judicial district in which the refusal occurred for an order discontinuing the disqualification. The petition shall set forth grounds, including that the cooperation by petitioner with the grand jury at the time of the refusal was such, and the amount and degree of control and financial interest, if any, in the petitioning firm, partnership or corporation by the member, partner, officer or director who refused to waive immunity is such, that it will not be in the public interest to cancel or terminate petitioner's contracts or to continue the disqualification, as provided in sections one hundred three-a and one hundred three-b of this article.

A copy of the petition and accompanying papers shall be served with the notices to be given pursuant to this subdivision.

2. Upon the filing of such petition the court may stay as to petitioner, pending a decision upon the petition, the cancellation or termination of any contracts resulting from such refusal upon such terms as to notice or otherwise as may be just.

3. At least two days prior to the return day, the officer who conducted the investigation before the grand jury and the attorney general may file answers to the petition or apply for judgment dismissing the petition as a matter of law. On or before the return day the petitioner may file a reply to the answer.

4. Upon the return day the court may, upon the petition and answer and other papers filed, forthwith render such judgment as the case requires, or if a triable issue of fact is duly raised, it shall forthwith be tried before a court sitting without a jury or before a referee. The provisions of statute or rule governing references in an action shall apply to a reference under this subdivision.

5. The court shall render judgment dismissing the petition on the merits or discontinuing the disqualification upon the ground that the public interest would be served by its discontinuance, and granting such other relief as to the cancellation or termination of contracts as may be appropriate, but without costs to petitioner. Added L.1960, c. 606, §4; amended L.1962, c. 310, §177, eff. Sept. 1, 1963.

Notes on Sister Statutes in State Finance Law and Public Authority Law

Sections 139b and c of the State Finance Law of New York State and sections 2602 and 2603 of the Public Authority Law of New York State are virtually identical to sections 103b and 103c set forth above except the State Finance Law covers contracts "with the State or any public department, agency or official thereof and the Public Authority Law covers contracts" with any public authority or any official of any public authority created by the state or any political subdivision.

SUPREME COURT, U. S.
FILED
OCT 26 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 653

FROHMAN HOLLAND, IRVING HOLLAND, HARVEY MILLER, ROBERT SAUNDERS, BERT GILBERT, on their own behalf and on behalf of all other persons similarly situated,
Plaintiffs-Appellants,

RICHMOND KOTCHER, NORTON KOTCHER, DAVID GIMPEL and JACK SACKS,
Intervenor Plaintiffs-Appellants,

MICHAEL W. CAMMAROSANO and EDWARD BRENNAN and all other officers and employees of the Borden Company,
Intervenor Plaintiffs,

against

FRANK S. HOGAN, District Attorney and SAMUEL YASGUR, Assistant District Attorney and each and every Assistant District Attorney of New York County, and SAMUEL ADLER,
Defendants-Appellees,

LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,
Intervenor Defendant-Appellee.

MOTION TO AFFIRM

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FRANK S. HOGAN, District Attorney and SAMUEL YASGUR, Assistant District Attorney and each and every Assistant District Attorney of New York County, and SAMUEL ADLER,

Defendants-Appellees,

LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,

Intervenor Defendant-Appellee.

MOTION TO AFFIRM

Statement

This action was brought under 42 U.S.C., §1983, against the District Attorney of New York County and the Director

of Purchase of the City of New York. The Attorney General of the State of New York intervened in support of the defendants.

This class action sought to enjoin the defendants from doing acts pursuant to New York State General Municipal Law, Section 103-b, and other New York laws of similar purport, alleging that the plaintiffs were, by such acts, being deprived of their right, under the Fifth and Fourteenth Amendments of the United States Constitution, not to incriminate themselves. Plaintiffs also sought to have these State laws declared unconstitutional.

Motions by the plaintiffs for an interlocutory injunction and for summary judgment were referred to a three-judge court. That court denied the motions, and it stayed the action pending resort to State court proceedings by the plaintiffs. This appeal is from that order.

The Motions

(1)

The affidavits in support of the motions state that: The plaintiffs are officers of milk companies engaged in the sale and distribution of milk in the New York City area. They and other milk company executives appeared, pursuant to subpoena, before a grand jury. Before entering the grand jury room they were shown blank forms of waivers of immunity and were told they would be asked to sign them. On advice of lawyers who were present with them, they stated that they would not sign the waivers. Before the grand jury they were advised that it was investigating

bribery, coercion, extortion, conspiracy and price rigging in the milk industry. They were warned about General Municipal Law, Section 103-b, and its application in the event that they should refuse to waive immunity. They refused to sign waivers. Some, at least, did this after leaving the room and consulting their attorneys. They were not asked any specific question relating to any transaction, contract or bid with the State of New York or any of its political subdivisions.

The affidavits also assert that the statement made to them concerning the General Municipal Law provision was regarded by them as threatening them and their companies with economic loss.

They state that a list of companies whose officers refused to waive immunity was sent to various governmental officials including the appellee Adler. It is also stated that two of the companies, although they were the lowest bidders, were not given City contracts, and that the contracts were awarded to higher bidders.

(2)

An affidavit by Marvin Gersten, dated May 1, 1967, was submitted on behalf of appellee Adler. It recites that Mr. Gersten is the Acting Commissioner of Purchase of the City of New York, that is, the superior of appellee Adler. It states that he has instructed Mr. Adler that persons or corporations who have refused to waive immunity before the grand jury investigating crimes in the milk industry are not to be automatically disqualified from being

awarded a City contract, and that they shall not be denied "the award of any city contract solely by reason of the fact that his or its name appears in a notice of refusal." It then directs that:

> "(b) Such persons or corporations listed in a notice of refusal shall be accorded a hearing at which an opportunity will be given to explain the refusal to waive immunity or to answer a question before the grand jury, investigating public contracts."

It goes on to state that, where such a person is the low bidder on a City contract, a Board of Responsibility shall be convened in accordance with a 1949 resolution of the New York City Board of Estimate. That resolution provided that such a bidder should be disqualified as a responsible bidder only upon the determination of such a board.

ARGUMENT

General Municipal Law, Section 103-b, is constitutional. Certainly it is constitutional as construed and applied by the City of New York and appellee Adler.

Slochower v. *Board of Education*, 350 U. S. 551 (1956), involved the dismissal of a teacher at a public college pursuant to Section 903 of theNewYork City Charter because he had refused, before a Congressional committee, to answer questions concerning membership in the Communist Party. The opinions of this Court first made it clear that a sinister meaning could not be imputed merely because a person exercised his right under the Fifth Amendment to refuse to testify. The opinion then said that Section 903,

as interpreted and applied, operated to discharge every employee who invoked the Fifth Amendment (p. 558). It went on to say that the questions asked were being taken as confessed and that no consideration was being given to such factors as the subject matter of the questions or justification for the exercise of the privilege.

It then said (p. 558):

> "It is one thing for the city authorities themselves to inquire into Slochower's fitness, but quite another for his discharge to be based entirely on events occurring before a federal committee whose inquiry was announced as not directed at 'the property, affairs, or government of the city, or * * * official conduct of city employees.'"

The case, therefore, appears to have been decided on two grounds. One related to the nature of the inquiry at which the refusal to testify occurred. The other emphasized the automatic discharge for exercising the Fifth Amendment right before an agency other than the employer—the absence of an opportunity for the employee to explain his exercise of the privilege or for the employer to consider the circumstances of the refusal to answer.

Other decisions of this Court hold that a public employee who fails to answer questions relating to his employment may be dismissed pursuant to a relevant statute if he has had an opportunity to explain his refusal at a hearing before an appropriate body. *Beilan* v. *Board of Education*, 357 U. S. 399 (1958); *Lerner* v. *Casey*, 357 U. S. 468 (1958); *Nelson* v. *County of Los Angeles*, 362 U. S. 1 (1960).

New York City Charter, Section 903, involved in the *Slochower* case, and its successor section, Section 1123 of the City's new charter, are identical. Both, if read literally, require an automatic dismissal of an employee for refusal to testify at specified hearings or inquiries. Nevertheless, after the *Slochower* decision, the New York courts treated the section as requiring a hearing before dismissal. *Matter of Conlon* v. *Murphy*, 24 A D 2d 737, 263 N.Y.S. 2d 360 (1965). The same rule was applied in the two cases decided under the title of *Matter of Gardner* v. *Murphy*, 46 Misc 2d 728, 260 N.Y.S. 2d 739 (1965). As a result the petitioner Gardner was given a hearing and, thereafter, dismissed. *Matter of Gardner* v. *Broderick*, 27 A D 2d 800 (1967), affd. 20 N Y 2d 227 (1967).* The companion case was reversed because of its peculiar circumstances. *Matter of Koutnik* v. *Murphy*, 25 A D 2d 197, 268 N.Y.S. 2d 265 (1966), app. to New York Court of Appeals pending.

General Municipal Law, Section 103-b, is closely analogous to the Charter section just discussed. Its literal terms indicate that it mandates automatic disqualification. At present, however, the construction placed on it by the City of New York is similar to that now being given to the Charter section. In an affidavit in opposition to appellants' motions, the City's Acting Commissioner of Purchase described the practice which he has directed the appellee Adler, his subordinate, to follow. Under it there is no automatic disqualification for refusal to waive immunity before a grand jury. A hearing is granted at which an opportunity is given to explain the refusal to waive immunity or to answer questions before a grand

* This case is presently on appeal to this Court (No. 635).

jury investigating public contracts. And a low bidder on a City contract will not be disqualified unless, after such a hearing, a Board of Responsibility concludes that the bidder is not a responsible bidder.

Thus, it is not necessary to consider whether a statute which requires automatic disqualification would be valid. In the present case the only defendant who could apply General Municipal Law, Section 103-b, is the appellee Adler, who might apply it on behalf of the City of New York. And it is clear that he will not apply it as *automatically* disqualifying the appellants as sellers to the City. The other defendants, other than the intervenor-defendant, are the District Attorney of New York County and his assistants. They are parties because they have warned the appellants and perhaps others, who refused to waive immunity before the grand jury investigating price rigging and similar crimes in the milk industry of the disqualification provisions of the General Municipal Law section. The intervenor-defendant came into the case to support the validity of the statute.

We submit there is nothing in the cases decided by this Court that bars a city from refusing to purchase from a corporation whose officers have refused to testify before a grand jury investigating price rigging where, before such a refusal to purchase, the corporation is given a full opportunity to explain the failure to testify or otherwise to show that it is a responsible bidder.

Garrity v. *New Jersey*, 385 U. S. 493 (1967), has no direct relevance. At most it might furnish some support

for an argument that those who testify because of fear of the application of the General Municipal Law provision can have that testimony or any evidence obtained as a result of it excluded in a subsequent criminal case brought against them.

Spevack v. *Klein*, 385 U. S. 511 (1967), has some relevance, but it is readily distinguishable. The distinction is evidenced by the reservations, in footnote 3 of the majority opinion and in Justice FORTAS' concurring opinion, with regard to whether a public employee may be discharged for refusing to answer appropriate questions in disciplinary proceedings. The issue in the present case is, at least, as different from the issue decided in *Spevack* as the issue which this Court said it was not passing on.

The cloak of protection that this Court has provided those who invoke the Fifth Amendment is broad, but there would appear to be no valid reason to transform it into a bar against a reasonable investigation by governmental buyers of the reasons why those who wish to sell to them refused to testify in an investigation of price rigging. A statute, construed to require such an investigative hearing before disqualifying such sellers, does not violate the appellants' constitutional rights.

This Court has gone far in protecting such rights, but it has not and, we submit, should not add to such protection a bar against a reasonable investigation, under appropriate procedural safeguards, by a purchaser as to why one who wishes to sell goods to it has refused to testify concerning its selling practices.

CONCLUSION

The motion to affirm the order appealed from should be granted.

October 23, 1967.

Respectfully submitted,

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Corporation Counsel,
Counsel for Appellee
Samuel Adler.

NORMAN REDLICH,
STANLEY BUCHSBAUM,
MORGAN N. LIPTON,
of Counsel.

SUPREME COURT. U. S.

Office-Supreme Court, U.S.
FILED
MAY 6 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 653

FROHMAN HOLLAND, IRVING HOLLAND, HARVEY MILLER, ROBERT SAUNDERS, BERT GILBERT, on their own behalf and on behalf of all other persons similarly situated,

Plaintiffs-Appellants,

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Intervenor Plaintiffs-Appellants,

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Intervenor Plaintiffs,

against

FRANK S. HOGAN, District Attorney and SAMUEL YASGUR, Assistant District Attorney and each and every Assistant District Attorney of New York County, and SAMUEL ADLER,

Defendants-Appellees,

LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,

Intervenor Defendant-Appellee.

MOTION TO DISMISS OR AFFIRM ON BEHALF OF FRANK S. HOGAN, DISTRICT ATTORNEY, AND THE ASSISTANT DISTRICT ATTORNEYS OF NEW YORK COUNTY, APPELLEES

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H. RICHARD UVILLER
MICHAEL R. STACK
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Defendants-Appellees,

LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,

Intervenor Defendant-Appellee.

MOTION TO DISMISS OR AFFIRM

Preliminary Statement

In this action for an injunction and summary judgment, plaintiffs sought to enjoin the defendants herein from "invoking, enforcing or executing, in whole or in part, the

applicable statutes [N. Y. General Municipal Law, §103-b] or threatening to do so, including the sending of any notice thereunder or threatening to send said notice or refusing to honor bids invoking any other portion of the applicable statutes." The statutes referred to, Section 103-b of the New York State Finance Law, and Section 2602 of the New York State Public Authorities Law, are similar in nature: Section 103-b of the New York State General Municipal Law, the statute particularly at issue here, is set forth *infra* for the convenience of the Court. Plaintiffs sought the injunction on the ground that the statutes are unconstitutional in that they tend to abridge their rights under the Fifth and Fourteenth Amendments to the Constitution of the United States. Furthermore, they asserted that unless the injunctive relief sought herein was granted, they would suffer irreparable harm and damages which, they contend, could not be adequately compensated at law. Accordingly, this action was brought pursuant to the provisions of Title 42 U.S.C. §1983.

As provided by Title 28 U.S.C. §§2281, 2284, and by order dated April 14, 1967, the plaintiffs' motion for an interlocutory injunction and summary judgment was referred to a three-judge court convened by order of Judge William B. Herlands. The plaintiffs' motion was denied after a plenary hearing by order entered June 27, 1967. A notice of appeal to this Court was thereafter filed with the Clerk of the United States District Court for the Southern District of New York on July 26, 1967.

This Court's jurisdiction is invoked under Title 28 U.S.C. §1253.

The Facts

Heretofore, the Third March 1967 Grand Jury assembled to investigate whether certain corporations (not parties to the instant suit) which regularly sell milk to the City had conspired amongst themselves to prevent competitive bidding on public contracts, and to commit the crimes of extortion, coercion, bribery, and conspiracy in relation to contracts for the sale of milk to various governmental agencies in New York. The plaintiffs, each of whom are officials of those corporations, were subpoenaed to appear before the grand jury and testify under a waiver of immunity. They each refused to execute the proffered waiver, and consequently were notified by the assistant district attorney conducting the investigation of the provisions of Section 103-b of the New York General Municipal Law requiring the District Attorney to forward to the appropriate city and state agencies notification of their failure to sign. Without further ado, plaintiffs were then excused from the grand jury room.

Thereafter, the District Attorney informed the appropriate city and state agencies of the failure of plaintiffs to execute the waivers of immunity and to testify. To date, no milk corporation has been disqualified from doing business with the City of New York, although several state agencies have disqualified various firms. However, the Director of Purchases of the City of New York has, after a hearing before a "Board of Responsibility" at which an employee of the Dairymen's League Cooperative Association had declined to answer several questions concerning

the submission of collusive bids, declared that the Dairymen's League not to be a responsible bidder and accordingly has disqualified it from bidding on a certain contract. This determination has been sustained by the New York State Supreme Court [see *Dairymen's League Co-operative Ass'n, Inc.* v. *Perrini*, —— Misc. 2d ——, 282 N.Y.S.2d 887 (Sup. Ct. N.Y.Co. 1967)].

Presently, the grand jury has completed that phase of its investigation which requires the testimony of persons subject to the provisions of the challenged statute. Therefore, at this juncture the defendant District Attorney does not intend to call any additional witnesses who are executives of milk firms required to testify under waiver of immunity. This representation was made on argument to the court below. Additionally, no notices pursuant to Section 103-b will be posted to any governmental agency, as all of the interested agencies have already been apprised of the plaintiffs' refusal to waive and testify.

The Constitutional and Statutory Provisions Involved

United States Constitution, Amendment V.

United States Constitution, Amendment XIV, Section 1.

Section 103-b of the New York General Municipal Law entitled "Disqualification to contract with municipal corporations and fire districts" which provides as follows:

> "Any person who, when called before a grand jury to testify concerning any transaction or contract had with the state, any political subdivision thereof, a public authority, or with a public department, agency or official of the state or of any political subdivision there-

of or of a public authority, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract, and any firm, partnership or corporation of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any municipal corporation or fire district, or with any public department, agency or official thereof, for goods, work or services, for a period of five years after such refusal or until a disqualification shall be removed pursuant to the provisions of section one hundred three-c of this article.

"It shall be the duty of the officer conducting the investigation before the grand jury before which the refusal occurs to send notice of such refusal, together with the names of any firm, partnership or corporation of which the person so refusing is known to be a member, partner, officer or director, to the superintendent of public works of the state of New York and the appropriate departments, agencies and officials of the state, political subdivisions thereof or public authorities with whom the person so refusing and any firm, partnership or corporation of which he is a member, partner, director or officer, is known to have a contract."

Section 103-c of the New York General Municipal Law entitled "Removal of disqualification of public contractors by petition" which provides as follows:

"1. Any firm, partnership or corporation which has become subject to the cancellation or termination of a contract or disqualification to contract on account of the refusal of a member, partner, director or officer thereof to waive immunity when called to testify, as provided in sections one hundred three-a and one hundred three-b of this article, may, upon ten days' notice

to the attorney general and to the officer who conducted the investigation before the grand jury in which the refusal occurred, commence a special proceeding at a special term of the supreme court held within the judicial district in which the refusal occurred for an order discontinuing the disqualification. The petition shall set forth grounds, including that the cooperation by petitioner with the grand jury at the time of the refusal was such, and the amount and degree of control and financial interest, if any, in the petitioning firm, partnership or corporation by the member, partner, officer or director who refused to waive immunity is such, that it will not be in the public interest to cancel or terminate petitioner's contracts or to continue the disqualification, as provided in sections one hundred three-a and one hundred three-b of this article."

* * *

POINT I

As no further witnesses will be called pursuant to the challenged statute, the injunction sought would serve no purpose; therefore, the action against the District Attorney and his assistants should be dismissed on grounds of mootness.

Plaintiffs seek the review of an order in which the lower court refused to enjoin the District Attorney of New York County from invoking upon them the provisions of Section 103-b of the New York General Municipal Law. We now represent to this Court, as we have previously informed plaintiffs and the court below, that since April 20, 1967, the grand jury investigation into the milk companies' alleged illicit activities has not required the testimony of any addi-

tional witness covered by Section 103-b. Therefore, the District Attorney will not subpoena any such witnesses before that body, and consequently; of course, will not advise any city or state agency of the failure of any milk dealer to testify or sign a waiver of immunity. The proposed injunction then, at least insofar as the defendant Hogan is concerned, would serve absolutely no purpose.

In making this assertion, we recognize that many cases have held that an action for an injunction does not become moot merely because the conduct immediately complained of has terminated, if there is a possibility of a recurrence which would be within the terms of a proper decree. Thus, in *United States* v. *Trans-Missouri Freight Ass'n,* [166 U. S. 290 (1897)], this Court held that an action to enjoin an association of railroads as an unlawful combination did not become moot when the association was dissolved, since a similar combination might be formed in the future—and indeed actually had been. In the case at bar, however, there is no possibility of a recrudescence of the challenged actions concerning these plaintiffs; in fact, there is not even a claim that it will recur.

In addition, it is indisputable that the District Attorney has no official or unofficial role in the disqualification proceedings, should they occur, other than that described above, *i.e.,* to notify appropriate state and municipal agencies of the refusal of an officer of a contracting firm to testify or waive immunity. His sole duty has long since been performed. Accordingly, inasmuch as defendant Hogan is not charged with either the enforcement or execution of the statute, this action, which requests the enjoining of the disqualification proceedings, should be dismissed as to him on grounds of mootness.

POINT II

This important matter is premature in this Court.

The appellants here challenge a state statute under which they have, as yet, suffered no harm. While notices of their failure to abide by its conditions were forwarded to appropriate municipal agencies, none has evoked the statutory disabilities flowing therefrom against the appellants. Accordingly, in the present case, there has been no opportunity for state tribunals to pass upon the constitutionality of the particular statute which the appellants seek to draw in question. For these reasons, the three-judge court convened below abstained from adjudicating the several issues presented by appellants, on the ground that the statutes involved had not yet been authoritatively construed by the state courts.

The appellants contend that the previously asserted basis for federal abstention has since been dispelled by the recent decision of the Second Circuit Court of Appeals in *Uniformed Sanitation Men's Ass'n, Inc.* v. *Commissioner of Sanitation,* —— F.2d ——, Docket No. 31014, decided September 28, 1967. In that case, the Circuit Court declined to abstain because, prior to that decision, the New York Court of Appeals had in two cases held constitutional provisions similar to those involved in that case and in this [*Gardner* v. *Broderick,* 20 N.Y. 2d 370 (1967); *George Campbell Painting Corp.* v. *Reid,* 20 N.Y. 2d 227 (1967)]. The federal court's refusal to abstain in *Uniformed Sanitation Men,* however, does not affect the soundness of the application of the abstention doctrine by the court below

in the present case. For in the *Sanitation* case, as in the two state cases referred to there, the statute in question had been invoked to disqualify or discharge from office the party plaintiff. Here, by contrast, the statute has not been utilized by any party-defendant to disqualify any plaintiff from contracting with municipal agencies. Instead, as the Corporation Counsel indicated to the court below, the policy of the City of New York is to rely upon an altogether distinct procedure. Rather than automatic disqualification by operation of §103-b of the General Municipal Law, the City is proceeding pursuant to a Resolution of the Board of Estimate [Petitioner's Brief, p. 47], by which hearings are conducted by a "Board of Responsibility" to determine whether any prospective contractor is a "responsible bidder."

The appellants here claim that the proceedings of the Board of Responsibility are the direct outgrowth of the operation of the statute in question, and that through this device, the statute, although not applied according to its terms, has in effect harmed them. They refer to the single instance in which a corporation employing one of the plaintiffs herein was found not to be a responsible bidder, after a hearing, and disqualified from submitting bids on a particular city contract. The decision of the Board in that case was affirmed by a Special Term of the Supreme Court of the State of New York [*Dairymen's League Co-operative Ass'n, Inc.* v. *Perrini*, —— Misc. ——, 282 N.Y.S. 2d 887 (Sup. Ct., N.Y.Co., June 8, 1967)]. But it is clear that the present action cannot be deemed a challenge to the constitutionality of a procedure altogether independent of §103-b. Appellate remedies within the state framework

are, of course, open to the disqualified corporation should it elect to contest further the adjudication. Surely, the present appeal to this Court cannot be regarded as a challenge to that procedure. Moreover, sound principles of comity dictate resort to available state procedures in the first instance. Nor can the decision at Special Term in the *Dairymen's League* case be regarded as state gloss upon the statute challenged by the appellants in the present action.

Thus, the present posture of this case remains precisely as it was below: the challenged statute has not been invoked nor has it been construed by state appellate courts. The fact that a cognate procedure under a different law was utilized to achieve a somewhat similar result does not serve to resolve open questions of state law which pertain to the statute in question. This Court is therefore asked to pass upon the constitutionality of a state statute where the "resolution of the federal constitutional question is dependent upon or may be materially altered by the determination of an uncertain issue of State law" [*Harman* v. *Forssenius*, 380 U.S. 528, 534 (1965); see also, *Davis* v. *Mann*, 377 U.S. 678 (1964); *County of Allegheny* v. *Frank Mashuola Co.*, 360 U.S. 185 (1959)]. Under these circumstances, this Court should defer to state procedures, and await future developments which may ripen the issue for adjudication by this Court or the lower federal tribunals.

In light of the high degree of local interest, it is particularly desirable that the federal courts decline to consider matters which the state tribunals can and will pass upon. In this respect, we note that appellants have raised the

question, at pages 27-8 of their brief, of whether the waiver proffered by the District Attorney was a limited waiver within the scope of Section 103-b. If it was not, then neither the corporations employing appellants, nor the appellants themselves, could be disqualified under the applicable statute. This threshold question must, of course, be resolved in any future attempt to disqualify plaintiffs, and can only be resolved by a state court construing state law.

Further, it is entirely possible that the corporations involved in the present matter will never be formally disqualified by the City from bidding pursuant to the provisions of Section 103-b, but that the City will choose to rely entirely on the above-mentioned "Responsibility Hearing" to determine to whom a contract shall be awarded. This, of course, has nothing whatever to do with the provisions of Section 103-b, and would be adequate state grounds for refusing to do business with these organizations. Thus, the constitutional issue presented need not ever be resolved, and, just as significantly, the resolution of those issues by this Court might be of academic interest only.

POINT III

The disqualification of firms doing business with the City for failure of their officers to cooperate with a grand jury investigation is not repugnant to the Fifth or Fourteenth Amendments to the United States Constitution; moreover, this procedure does not deprive plaintiffs of their Fifth Amendment privilege.

Although, as pointed out above, we do not believe that defendant Hogan and his assistants are a proper party to this action, nor do we consider this Court to be now the proper forum to adjudicate the issues presented, we are grateful for the opportunity here afforded to discuss the constitutional question involved.

The gravamen of appellants' argument is that the statute is unconstitutional in that it compels them to forfeit their Fifth Amendment privilege for fear of economic sanctions. In support of this contention they allege, and for purposes of this argument we do not contest, that they are either major stockholders or highly paid employees whose economic interests would be jeopardized should a disqualification ensue. In brief, they assert that the statute [Gen'l Mun. L., Sec. 103-b] is in all respects analogous to the statutes (or court rules) involved in the *Garrity* and *Spevack* cases [*Garrity* v. *New Jersey*, 385 U. S. 493 (1967); *Spevack* v. *Klein*, 385 U. S. 511 (1967)], and accordingly demand that this Court, in conformity with those decisions, declare Section 103-b to be unconstitutional. The fault in the argument, however, is that the Court in both *Garrity* and *Spevack* expressly forbore deciding the issue presented here. Nevertheless, a close read-

ing of those decisions, as well as a review of the legal principles involved, warrants the conclusion that the statute is constitutional.

To begin with, it is by now abundantly clear from a long line of cases commencing with the oft-cited *Hale* v. *Henkel* [201 U.S. 43 (1906)], that a corporation is not a person within the meaning and protection of the privilege against self-incrimination. Thus, for example, a corporation cannot refuse to surrender its books and records in response to a subpoena on grounds that it would tend to incriminate itself or one of its members [*United States* v. *White*, 137 F.2d 24 (C.C.A.Pa. 1943)]. Without the privilege to withhold incriminating evidence, the corporate contractor cannot complain, on Fifth Amendment grounds, of a term in a contract requiring them to furnish oral testimony concerning corporate actions. The municipal party deprives a corporate contractor of nothing by the insertion of such a term in the contract, or by the enactment of a law to like effect. Recision of the contract for breach is, of course, no greater infringement of constitutional rights, the clause itself being a legal term. Thus, where one party to the contract is a corporation, as here, the *Garrity-Spevack* doctrine, founded on the personal Fifth Amendment right, is inapplicable.

The officer or director, however, might, as happened here, refuse to disclose the requested information on the ground that it tends to incriminate him personally. His right to do so is absolute—he cannot be legally compelled to supply the information which may later be used to convict him without commensurate immunity. On the other

hand, the corporation—*qua* corporation—has clearly failed to fulfil the terms of its undertaking and breached the terms of its contract. Nor can it rely on the employees' privilege in a suit for damages or as a defense to an action to rescind, as the defense is a personal privilege for the benefit of a witness and cannot be claimed for the benefit of another [*Hale* v. *Henkel*, 201 U.S. 43, 51 (1906)].

The appellants' argument here, however, is not that corporations are divested of any constitutional right, but that the statute operates to penalize them as individuals for asserting the privilege by threatening to a greater or lesser degree their means of livelihood. And, their argument continues, the *Garrity* and *Spevack* cases prohibit "any sanction which makes assertion of the Fifth Amendment privilege costly." [*Spevack, supra,* at 515]. Despite the sweeping language of the majority in that case, it must be recognized that the holding was in fact a limited one: all that was decided was that an attorney could not be deprived of that status because of his reliance on the constitutional right of silence. In the present case, neither individuals nor corporations are threatened with the loss of any right or status granted in the first instance by the state.

Deprivation of the privilege of contracting with municipal agencies may occasion financial loss, but there is no legal impairment of the right to continue to do business. The milk dealer's license is not in jeopardy. For this reason alone, *Spevack* is inapplicable here. The contractual relationship here involved is closer to the employer-employee relationship of the *Garrity* decision. And there,

significantly, the five-man majority declined to hold that the state was obliged to maintain the relationship with a party who had refused to testify without immunity. State and federal courts, moreover, have subsequently held affirmatively that the requirement of candid testimony, under waiver of immunity, from public officers and contractors concerning their conduct as such, is reasonable and gives no offense to the Constitution [see, *Gardner* v. *Broderick*, 20 N.Y.2d 370 (1967); *George Campbell Painting Corp.* v. *Reid*, 20 N.Y.2d 370 (1967); *Uniformed Sanitation Men Association, Inc.* v. *Commissioner of Sanitation*, —— F.2d ——, 2d Cir. Docket No. 31014, September 20, 1967; *United States ex rel. Laino* v. *Warden*, 246 F.Supp. 72 (S.D.N.Y. 1965)]. Significantly, too, Justice FORTAS indicated in his *Spevack* concurrence that he might approve inducing testimony by threat of loss of public trust, if a state employment contract rather than a license is involved. Hence, it would appear that, by analogy of business contract to employment, the disqualification of the plaintiffs' corporations here would meet majority approval in the Supreme Court under the *Garrity-Spevack* doctrine.

The plaintiffs contend that, regardless of the state procedures that may be developed to enforce the provisions of Section 103-b, that statute is unconstitutional because of the threat it contains of possible future economic consequence by reason of an individual's assertion of a constitutionally guaranteed right. But the "threat" of consequence cannot itself be unlawful if the threatened consequence is lawful. Therefore, if, as we contend, there is no constitutional deprivation in the disqualification of a corporate contractor, surely the individual is under no illegal

compulsion by reason of being informed of this fact. And the result, in essence, is as simple as it is reasonable. The City, as a contractor, may exact terms to assure itself that its suppliers are hiding no criminality in their dealings. Lack of satisfaction on this score entitles them to terminate existing contracts and refrain from future dealings with the business enterprises involved. This unquestionably visits a penalty upon the units for failure to disclose information which may incriminate them. But, being without the scope of Fifth Amendment protection, they have no status to complain of the penalty. Similarly, the individuals, officers and directors may refuse, on constitutional grounds to testify to what might incriminate them personally, as they did here. But no consequences are visited upon them personally for such refusal. Their employment contracts with the companies are not directly affected, nor is their right to continue in business. The only economic effect, under the challenged law, is visited upon the corporation with which they are associated, independent entities in law. Secondary consequences which may flow by the corporations' election to sever the disqualifying relationship is not attributable to state action. It is a speculative consideration, and it is surely beyond the state's obligation to protect an individual from a possible decision by his private corporate enterprise predicated upon its independently exercised business judgment.

The allegations of certain plaintiffs herein, that as stockholders they will be injured, are easily rebutted. Obviously, all owners of the enterprise may suffer for the corporation's business reversals. This is a common risk of investment. If the management of the business ineptly or crookedly leads the business to the point where its buyers

forswear further trade, the stockholders suffer. This is true whether the buyer is a state organization or another private concern, and it is true regardless of the reasons for severing further dealings. The stockholders' complaint should be addressed to the management which led it to hard times—not to the buyer who dropped the account.

Thus, in conclusion, the proposition urged as the basis for the assertedly substantial federal question is fundamentally unsound. On the merits of the action, no federally cognizable right is impaired or imperiled, for, as seen, there is no inalienable right either to public service or to be awarded public contracts; both are subject to reasonable conditions such as those exacted by the challenged provision of New York law. Moreover, recent, consistent, and reasonable decisions of this Court, the lower federal courts, and the New York Court of Appeals deprive the question asserted of substantial federal importance. Accordingly, there is no warrant to consider the present appeal.

Conclusion

The order appealed from should be dismissed or affirmed.

Respectfully submitted,

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District Attorney
New York County

H. RICHARD UVILLER
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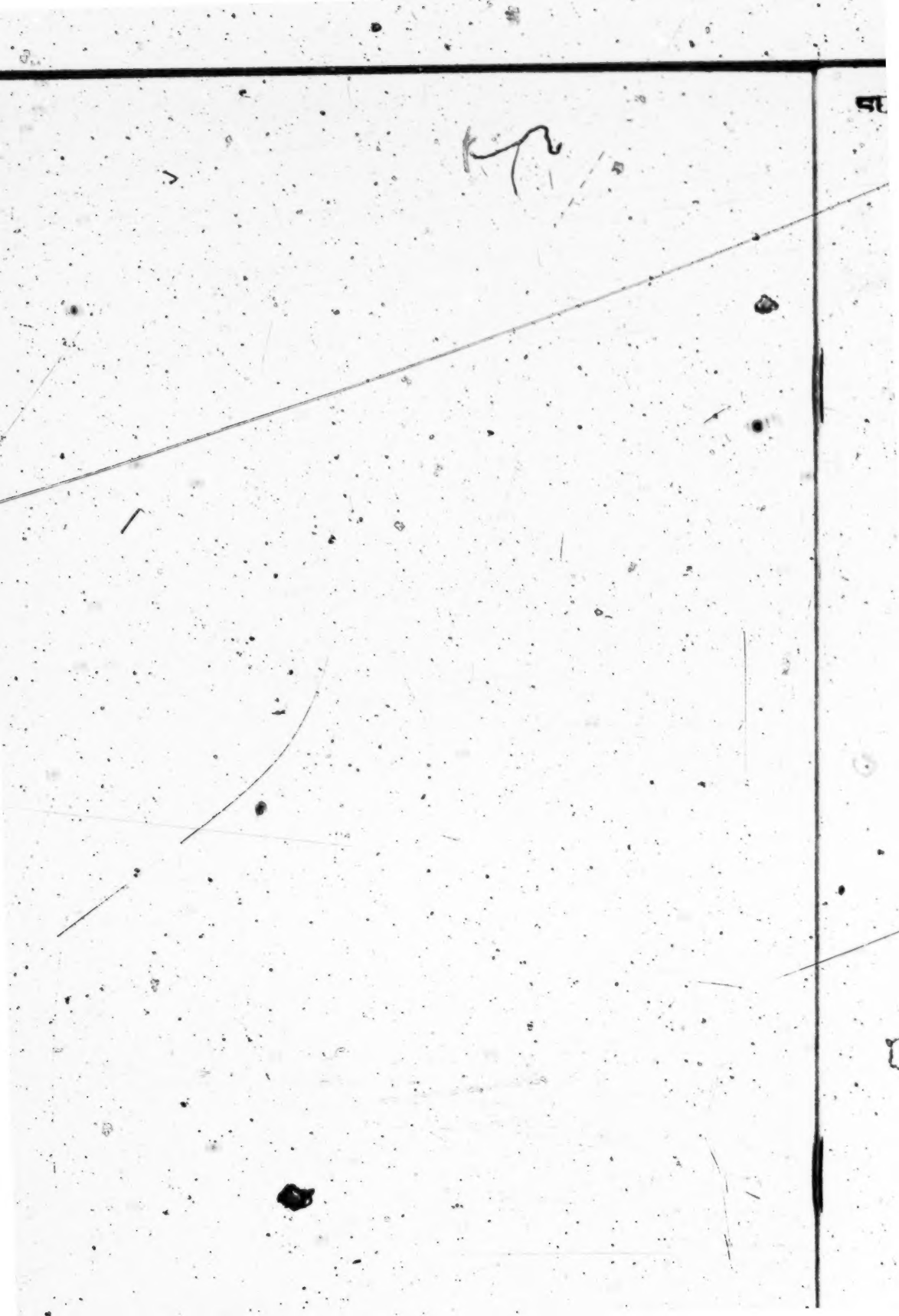
Assistant District Attorneys
Of Counsel

November, 1967



REME COURT, U. S.

FILED

NOV 10 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 653

FROHMAN HOLLAND, IRVING HOLLAND, HARVEY MILLER, ROBERT SAUNDERS, BERT GILBERT, on their own behalf and on behalf of all other persons similarly situated,
Plaintiffs-Appellants,

RICHMOND KOTCHER, NORTON KOTCHER, DAVID GIMPEL and JACK SACKS,
Intervenor-Plaintiffs-Appellants,

MICHAEL W. CAMMAROSANO and EDWARD BRENNAN and all other officers and employees of the Borden Company,
Intervenor-Plaintiffs,

against

FRANK S. HOGAN, District Attorney and SAMUEL YASGUR, Assistant District Attorney and each and every Assistant District Attorney of New York County, and SAMUEL ADLER,
Defendants-Appellees,

LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,
Intervenor-Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM BY ATTORNEY GENERAL OF THE STATE OF NEW YORK

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 653

FROHMAN HOLLAND, IRVING HOLLAND, HARVEY MILLER, ROBERT SAUNDERS, BERT GILBERT, on their own behalf and on behalf of all other persons similarly situated,

Plaintiffs-Appellants,

RICHMOND KOTCHER, NORTON KOTCHER, DAVID GIMPEL and JACK SACKS,

Intervenor-Plaintiffs-Appellants,

MICHAEL W. CAMMAROSANO and EDWARD BRENNAN and all other officers and employees of the Borden Company,

Intervenor-Plaintiffs,

against

FRANK S. HOGAN, District Attorney and SAMUEL YASGUR, Assistant District Attorney and each and every Assistant District Attorney of New York County, and SAMUEL ADLER,

Defendants-Appellees,

LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,

Intervenor-Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM BY ATTORNEY GENERAL OF THE STATE OF NEW YORK

Intervenor-appellee, Louis J. Lefkowitz, Attorney General of the State of New York, moves pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United

States, that the judgment of the United States District Court for the Southern District of New York be affirmed or, in the alternative, that this appeal be dismissed.

Opinion Below

The opinion of the Court below is not yet reported. It is reproduced as Appendix A to appellants' jurisdictional statement.

Jurisdiction

Appellants invoke the jurisdiction of this Court under 28 U.S.C. § 1253.

Statute Involved

New York State General Municipal Law, § 103-b (Appellants' Appendix B).

Questions Presented

1. Did the District Court improperly abstain from deciding the constitutional question presented in view of the patent necessity for State construction of the statute and appellants' insistence that the sanction of the statute was not available because State authorities did not comply with the statute?

2. Does the instant appeal present a justiciable controversy within the jurisdiction of this Court?

3. Does the question of the constitutionality of the statute raise a substantial federal question requiring a full hearing before this Court?

Statement

Appellants appeal directly from an order of a three-judge statutory court of the United States District Court for the Southern District of New York abstaining from deciding whether or not New York General Municipal Law § 103-b is consitutional. That statute provides in substance that, when a person called before a Grand Jury to testify concerning any transaction or contract had with the State or any of its political subdivisions "refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract", he and any corporation of which he is a director or officer shall be "disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any municipal corporation or fire district, or with any public department, agency or official thereof . . . for a period of five years after such refusal or until a disqualification shall be removed . . ."*

In their complaint, the appellants alleged that each is an officer of a named milk dealer "which engages, or may engage in any transaction or has or may obtain a contract or award or has submitted a bid for milk or dairy goods, work or services with the State of New York, any municipal corporation or fire district therein, any public authority therein or any public department, agency or official thereof" (Complt. ¶ 2).

Each appellant alleged that he was called by the District Attorney of New York County before the Grand Jury, that he refused to sign a waiver of immunity as specified in the statute and that, in consequence, the District Attor-

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* Although not directly involved in the instant case, New York Public Authorities Law § 2602 and State Finance Law § 139-b contain similar provisions.

ney was planning to send or had sent "a notice pursuant to the applicable statutes to the Superintendent of Public Works in the State of New York of the appropriate departments, agencies and officials of the state, political subdivisions thereof or public authorities with whom plaintiffs by the corporations and firms of which they are officers or directors, are known to have contracts" (Complt. ¶14) and that, in fact, the City's Purchase Director has "refused to recognize bids submitted by Queensboro Farm Products, Inc." (Complt. ¶14-a). Appellants did not allege that any action had been taken or was threatened against them as individuals or that any action had been taken pursuant to the applicable statutes. Indeed, they alleged, as a first cause of action, that the rejection of the bids was not authorized by the applicable statutes (Complt. ¶14-A).

Appellants, nevertheless, asserted that the statutes were unconstitutional under the Fifth and Fourteenth Amendments to the United States Constitution (Complt. ¶18). Because of this assertion the Attorney General, pursuant to 28 U.S.C. § 2284 and New York Executive Law § 71, intervened as a party defendant.

Milk contracts are awarded by the Department of Purchase on a month to month basis (*id.* at 41), and while the defendant Commissioner of Purchase on March 29, 1967 did disregard low bids by Queensboro Farm Products and Weissglass Gold Seal Dairy Corp. on three items, those two corporations were not declared to be disqualified from doing business with the City of New York. In fact, they were invited by the City to submit bids on the next month's milk contracts (*id.* at 40-41).

The City of New York has moved to set up procedures whereby the disqualification provisions of § 103-b of the General Municipal Law will not operate automatically with respect to City contracts. The City informed the District Court that none of the persons or corporations listed

in the notices of refusal which had been received as of the date the procedure was established was to be disqualified from receiving City contracts for five years automatically upon receipt of such notice of refusal (*id.* at 48). All such persons listed would be accorded a hearing and given an opportunity to explain the refusal to waive immunity or to answer a question before the Grand Jury investigating public contracts. In the event that any such persons or corporations were low bidders of a City contract, a meeting of the Board of Responsibility would be convened to pass upon the responsibility of the bidder. The Board of Responsibility consists of the Comptroller, the Corporation Counsel and the head of the agency making the award or their authorized representatives (*id.* at 47).

This proceeding was initiated by appellants suing in their individual capacities. Their corporations were not joined as parties plaintiff. However, at no time were any of the appellants licensed to engage in the milk business, none of them personally conducted such a business and none of them had any milk contract with the City or State of New York (*id.* at 43-44).

The three-judge Court abstained from assuming jurisdiction and did not pass on the merits on the constitutional questions presented. The Court, after reviewing the facts in the complaint and the contentions of the parties, concluded that "the uncertain and shifting factual and legal background of the present action requires us to abstain from passing judgment on the merits of plaintiffs' motions" (*id.* at 54), finding that this is "a classic case for invoking the doctrine . . ." (*id.* at 58). It concluded that recent cases particularly *Spevack* v. *Klein*, 385 U. S. 511 and *Garrity* v. *State of New Jersey*, 385 U. S. 493, had raised significant questions with respect to the constitutionality of § 103-b. The Court viewed the issue as one of competing interests between the doctrine of self-incrimination and the "demonstrated need to protect the public fisc against theft through collusive bidding on pub-

lic contracts and the manifest desirability of awarding public contracts only to those possessing certain minimal qualifications of moral worth and responsibility . . ." (*id.* at 59-60). The Court held that while significant state policies could not by themselves validate the means chosen to effectuate those policies, it was necessary for the Court to know how the statutes in question were to be construed (*id.* at 60). The Court then held that in view of the pending cases of *Gardner* v. *Broderick* and *Matter of Campbell* v. *Reid*, at that time before the New York Court of Appeals, it was not clear whether or not the statutes would be automatically applied. Moreover, the Court pointed out that a hearing procedure was being set up by the City of New York. The Court also found that there were ample procedures in the state courts to test the claim being raised (*id.* at 63-64).

The Court apparently rejected the contention of appellees that the appellants had no standing to raise the question since they were suing as individuals but only their corporations were affected by the disqualification procedures (*id.* at 64-65). The Court in sum held:

> "Substantial constitutional questions have been posed concerning the validity of presently uncertain state law; governmental action based on that state law affecting the plaintiffs here is far from final; ample and effective means appear to be available to challenge that action in the state courts when it becomes final and perhaps earlier; and, lastly, the claimed violations of federal constitutional rights can be raised in the state court proceedings or, if necessary, upon ultimate review by the United States Supreme Court." (*Id.* at 65-66)

REASONS FOR GRANTING THE MOTION TO DISMISS OR AFFIRM

I

There is no substantial basis for challenging the disposition by the District Court abstaining from deciding the merits of appellants' claim.

Appellants claim that the decision of the District Court, has been rendered inappropriate by the subsequent decisions of the New York Court of Appeals in *Gardner* v. *Broderick*, 20 N. Y. 2d 227, 229 N. E. 2d 184, appeal pending No. 635, Oct. T. 1967, and *George Campbell Painting Co.* v. *Reid*, 20 N. Y. 2d 370, 229 N. E. 2d 602, appeal pending No. 673, Oct. T. 1967. *Gardner* v. *Broderick*, *supra*, arising under § 1123 of the New York City Charter, involves the case of a New York City policeman who refused to sign a waiver of immunity to testify before the Grand Jury and was dismissed after an administrative hearing. The Court of Appeals held that it was not unconstitutional to require the waiver of immunity and to discharge a public employee who refused to sign such a waiver.

In *George Campbell Painting Co.* v. *Reid*, *supra*, arising under Public Authorities Law § 2601, the appellant corporation was disqualified from bidding on contracts to be awarded by the New York City Housing Authority because the person who was president of the corporation at the time certain contracts under investigation by the Grand Jury had been negotiated refused to sign a waiver of immunity when called before the Grand Jury. The Court, relying on *Gardner* v. *Broderick*, *supra*, held the disqualification to be valid. The Court said, however, that:

> "There may be times when the statute will operate to penalize a corporation which has severed its connection with the recalcitrant officer and which has otherwise been cooperative. The legislature has, however,

recognized this problem and has specified a procedure by which the disqualification can be removed under such circumstances (Public Authorities Law § 2603). The appellants' exclusive remedy is the procedure outlined in that statute."

The *Gardner* and *Campbell* decisions construe statutes which are virtually the same as General Municipal Law § 103-b. The United States Court of Appeals for the Second Circuit has held that, in view of those two decisions, there is no basis for federal abstention on the issue of dismissal for refusal to sign a waiver of immunity. *Uniformed Sanitation Men Association, Inc., et al.* v. *Commissioner of Sanitation, et al.*, —— F. 2d —— (2d Cir. Sept. 20, 1967), Sl. Sh. Op. p. 3401.

In spite of these three decisions, abstention was not improper in the instant case. As the District Court pointed out, not only the legal but the factual situation was unclear (Op. of the District Ct., Jurisd. Statement p. 54). While the Court of Appeals may be read to have construed the statutes under attack as operating automatically, the affirmance by that Court of the *Gardner* case indicates that it was not improper to hold an administrative hearing. The City has undertaken to hold such hearings to determine whether the disqualification provisions should be involved. Unless one accepts appellants' astounding argument that, even as public contractors, they may never be required to answer questions with respect to those contracts (See Juris. Statement, pp. 24-25), then it is clear that the nature of any constitutional questions would be different after a hearing than before one. See *Thorpe* v. *Housing Authority*, 386 U. S. 670; *Slochower* v. *Board of Higher Education*, 350 U. S. 551; *Spevack* v. *Klein*, 385 U. S. 511. For that reason, the decision of the District Court to abstain was proper. *Baggett* v. *Bullitt*, 377 U. S. 360.

Furthermore, appellants persist in their claim raised before the District Court that the District Attorney im-

properly applied § 103-b when he demanded a general, rather than a limited, waiver of immunity and that, in consequence, the sanction of such statute is not available. This is a threshold question of state law which, if resolved in favor of appellants, would obviously remove the occasion for any question of the constitutionality of § 103-b since any action taken would not be pursuant to the statute.

Appellants' argument that civil rights claims are never subject to the abstention doctrine is obviously incorrect. *Monroe* v. *Pape*, 365 U. S. 167, relied on by appellants, holds that exhaustion of state remedies is not required in civil rights actions. It does not deal with the question of abstention. Inapposite for the same reason are *McNeese* v. *Board of Education*, 372 U. S. 668 and *Stapleton* v. *Mitchell*, 60 F. Supp. 51 (D. Kan.).

Appellants' claim of irreparable injury finds no support in the record. The claim that "presumptively" the corporations with which they are associated are precluded from entering into any contract and that they have lost chances to bid on "the multitudes of contracts" available must be considered in light of the facts that if such corporations were low bidders on any of those contracts, such corporations have had available to them the Board of Responsibility procedure indicated by the City in the District Court.

Moreover, the appellants did not return to the District Court after the decisions by the New York Court of Appeals in *Campbell* and *Gardner* or make any other judicial application available to them.

II

The instant case does not present a justiciable controversy within the jurisdiction of this Court.

The appellants in this case sued as individuals and not on behalf of the corporations of which they are officers. They alleged that their individual privilege against self-

incrimination was violated by the threat that corporations with which they were associated would be disqualified from obtaining milk contracts if they did not sign waivers of immunity. It is clear that if appellants were to present an arguable claim that their privilege against self-incrimination has been violated, it would be requisite for them to establish either that improperly obtained testimony was used against them in criminal proceedings or that they, as individuals, have suffered a civil sanction solely because of their invocation of the privilege. In the instant case, concededly, not one of the appellants waived immunity, not one of them testified, and not one of them was indicted as a result of any such testimony being used against him. Contrast *Garrity* v. *New Jersey*, 385 U. S. 493.

Nor is there any arguable claim that they have suffered the imposition of a sanction as a result of their claim of such privilege. First, none of the appellants, as individuals, or as milk dealers, were licensed to sell milk as required by New York Agriculture and Markets Law § 257 and New York City Health Code, Article 3, § 111.05. It is axiomatic that one who is not directly aggrieved by the operation of the statute may not challenge its validity in a federal court. *McGowan* v. *Maryland*, 366 U. S. 420, 429-30; *United States* v. *Raines*, 362 U. S. 17, 20-24; *Tileston* v. *Ullman*, 318 U. S. 44. Here the only possible consequences of the refusal of appellants to sign the requested waivers of immunity are the civil sanctions to the corporations. Since there are no sanctions against the individual plaintiffs, it is untenable for such appellants as individuals to claim the standing to challenge the operation of the statute. *Poe* v. *Ullman*, 367 U. S. 497, 503-505.

Appellants' novel claim to meet this indispensable requirement is that they are substantial stockholders of the corporate licensees and may suffer some consequences of any possible disqualification of those corporate licensees. However, the allegation of speculatively indirect economic

detriment does not justify the action by the individual stockholders. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113; *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 122, 151. Even if each appellant owned all of the stock of the corporation, by electing to do business as a corporation he established a separate entity with its own rights, duties and liabilities. The corporation is neither responsible for its officers' or stockholders' individual liabilities, nor is it the beneficiary of their individual rights. *Noble* v. *C.I.R.*, 368 F. 2d 439, 445 (9th Cir. 1966); *In re Gibraltar Amusements Ltd.*, 291 F. 2d 22 (2d Cir.), *cert. den.* 368 U. S. 925; *Lagow* v. *United States*, 159 F. 2d 245 (2d Cir.). Appellants' claim that they are virtually unemployable certainly is not a result of the statute. The statute is directed only at officers or directors of corporations, it does not even apply to stockholders, let alone mere employees. And, of course, appellants are not, in fact, unemployed.

Peculiarly, the licensed milk dealer corporations were not made parties in this case. The complaint did not allege that it was a violation of due process of law to disqualify such corporations from obtaining city contracts because of any officers' refusal to sign a waiver of immunity. Moreover, appellants still insist that they are not seeking to raise any claim on behalf of the corporations. It is obvious, indeed, that the corporations could not assert a claim of violation of the privilege against self-incrimination since they do not have a privilege of their own and since they cannot assert that privilege on behalf of anyone else. *United States* v. *White*, 344 U. S. 694.

The individual appellants cannot claim a violation of their privilege against self-incrimination by virtue of the imposition of a sanction on another entity, that is, the corporation. They cannot circumvent the fact that any impact results on the corporation by claiming the derivative impact of that sanction. Any claim of violation of the

privilege depends on there being an identity between the person with the privilege and the person on whom any penalty is imposed. Absent such identity, no violation could be asserted.

III

The appeal fails to raise a substantial federal question.

Even if, *arguendo,* appellants could assert that their privilege against self-incrimination is violated by their refusal to waive immunity, it is clear that any disqualification results only from a lack of candor on their part. The position of appellants basically, is that they may never under any circumstances, in any form, be called upon to give an account of themselves with respect to public contracts. The Second Circuit in *Uniformed Sanitation Men, et al.* v. *Commissioner of Sanitation, supra,* has accurately analyzed the situation:

> "It was surely proper for a City official charged with a duty to do so to investigate charges of misfeasance in the operation of the Sanitation Department and in connection with such an investigation to question employees about their participation in activity which reflected the possibility of bribery and embezzlement. Can there be any reasonable doubt that an employee, especially one who has been warned of the consequence of his refusal to answer, can be (and, indeed, should be) discharged for such refusal?"

The District Court itself strongly stated the interest of the State (Jurisd. Statement pp. 59-60). The New York Court of Appeals in *Gardner* v. *Broderick, supra* and *Campbell* v. *Reid, supra* has reached the same conclusion. See also *United States ex rel. Laino* v. *Warden,* 246 F. Supp. 72 (S.D.N.Y.), *aff'd* 355 F. 2d 208 (2d Cir.).

The State has affirmatively dictated that it is of the highest importance that there be no collusive bidding or

bid rigging in any transactions involving public contracts. This the State has done by stipulating that in every public contract proper assurances be incorporated by the private contracting party to that effect (See e.g. General Municipal Law § 103-d). The New York statute is substantially identical with federal requirements. See 41 C.F.R. § 1-1, 317 (1965) (Federal Procurment Regulations).

In approving Section 103-b, Governor Rockefeller pointed out that:

> "Unlike a private person who may contract with whom he wishes, a public agency usually lets contracts by public auction and is required to accept the lowest bid. For that reason, it would seem appropriate to disqualify the bids of persons who are unwilling to disclose to a grand jury facts relating to some prior contract with the public. Likewise, it would seem appropriate that public contracts should provide that the benefit accruing under them be available only so long as the beneficiary is willing, when required by a grand jury to disclose any information he may have as to a public contract." *Memorandum of the Governor*, N. Y. STATE LEGISLATIVE ANNUAL (1959), p. 431.

The provisions here challenged are in no respect arbitrary. They do no more than seek to insure candor on the part of public contractors and the protection of the public from persons or corporations that feel they cannot be candid in their public dealings. There can be no question but that public bodies are entitled to such candor even absent a statutory provision. *United States ex rel. Laino* v. *Warden, supra,* at 93. This has repeatedly been held to be the case with public employees. *Nelson* v. *County of Los Angeles,* 362 U. S. 1; *Beilan* v. *Board of Public Education,* 357 U. S. 399; *Lerner* v. *Casey,* 357 U. S. 468; *Slochower* v. *Board of Higher Education,* 350 U. S. 551. The rationale which requires candor on the part of public

employees applies equally at least to public contractors. *United States ex rel. Laino* v. *Warden, supra,* at 94.

No decision of this Court has undermined the validity of the state procedures for insuring non-collusive bidding and honest performance of duties and contracts. As the Second Circuit pointed out, *Garrity* v. *New Jersey* is inapposite because no testimony was used in a criminal proceeding. See also *Gardner* v. *Broderick, supra.* This Court has already held that testimony obtained from a witness under threat of loss of employment is inadmissible in a criminal proceeding. There is no basis for finding that the sanction of job (or contract) loss must be an empty one. The only way the state can protect itself against contractors who will not be frank about their business with the state or its agencies is not to do business with them.

Nor can appellants find any support in *Spevack* v. *Klein,* 385 U. S. 511. Their reliance upon it is overbroad. That case involved neither a public employee nor public contractor but a licensed attorney whom the majority appear to have found had a property right in the license. See concurring opinion of Mr. Justice FORTAS (*id.* at 519-20). Accordingly it did not even suggest an overruling of such cases as *Nelson* v. *Los Angeles, supra; Beilan* v. *Board of Public Education, supra* and *Slochower* v. *Board of Higher Education, supra.* The principle enumerated in or of *United Public Workers* v. *Mitchell,* 330 U. S. 75. It decided only that the right to exercise the privilege against self-incrimination could not be withheld from the licensed attorney. It did not preclude the requirement of candor licensed of attorneys with narrow regard to the right of the State to any specific information. But the rights and privileges of licensees of business or professions dealing with the public are a far cry from the exercise of the established function of any governmental body, state or federal, to protect itself from the practices of collusive

bidding which have proved a cancer to the body public where tolerated. Accordingly, there is no property right to a public contract in New York. *Matter of Caristo Construction Corp.* v. *Rubin,* 15 A. D. 2d 561 (2d Dept.), *aff'd* 10 N. Y. 2d 538; *Matter of Zara Contracting Co., Inc.,* 45 Misc. 497 (Sup. Ct. Albany Co.), *aff'd* 23 A. D. 2d 718 (3rd Dept.), *lv. to app. den.* 16 N. Y. 2d 482. The necessity for candor required by the statute is, of course, far more compelling with respect to a public contractor who stands in a special relation to the government. The provision assailed by appellants is unquestionably an indispensible safeguard for the public against any venal conspiracy to defraud the state.

CONCLUSION

For the foregoing reasons the within motion to dismiss or affirm should be granted.

Dated: New York, New York, November 8, 1967.

Respectfully submitted,

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State of New York
Intervenor-Appellee
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SUPREME COURT, U. S.

FILED

NOV 29 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 653

FROHMAN HOLLAND, IRVING HOLLAND, HARVEY MILLER, ROBERT SAUNDERS, BERT GILBERT, on their own behalf and on behalf of all other persons similarly situated,

Plaintiffs-Appellants,

RICHMOND KOTCHER, NORTON KOTCHER, DAVID GIMPEL and JACK SACKS,

Intervenor Plaintiffs-Appellants,

MICHAEL W. CAMMAROSANO and EDWARD BRENNAN and all other officers and employees of the Borden Company;

Intervenor Plaintiffs,

against

FRANK S. HOGAN, District Attorney and SAMUEL YASGUR, Assistant District Attorney and each and every Assistant District Attorney of New York County, and SAMUEL ADLER,

Defendants-Appellees,

LOUIS J. LEFKOWITZ, as Attorney General of the STATE OF NEW YORK,

Intervenor Defendant-Appellee.

PLAINTIFFS-APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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Intervenor Defendant-Appellee.

PLAINTIFFS-APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

Statement

This brief is submitted on behalf of the plaintiffs-appellants herein in opposition to the Motions to Dismiss or Affirm made by counsel for all of the defendants-appellees,

Mr. Louis J. Lefkowitz, Attorney General of New York, hereinafter referred to as Attorney General, Mr. Frank S. Hogan, District Attorney of New York County, hereinafter referred to as District Attorney, and Mr. J. Lee Rankin, Corporation Counsel of the city of New York, hereinafter referred to as Corporation Counsel.

ARGUMENT

POINT I

Defendants' attempts to avoid the merits are totally without foundation.

The Attorney General and the District Attorney before discussing the substantial issues of constitutional law raised by this appeal attempt to shunt this case aside by a variety of technical means. Most of these technical objections were previously raised before the district court. They were so lacking in merit that although the district court decided, we submit erroneously, to abstain, its opinion clearly indicated the lack of merit of these technical objections. But now before this Court these arguments are trotted out again in an attempt to avoid a decision on the merits. But neither the Attorney General nor the District Attorney so much as refers to the district court's comments on these very arguments.

(a) Standing to sue

Both the Attorney General and the District Attorney, as they did in the District Court, contend that since the actions were brought by the individual milk company

executives whose exercise of their constitutional rights led to the invocation of the applicable statutes, rather than by the milk companies which were precluded from doing business with the public agencies, the plaintiffs lack standing to sue. This argument was emphatically rejected by the District Court, stating:

> "We do not believe that constitutional rights can be impaled on the horns of such a dilemma. The rule of practice which bars a litigant—even one who has suffered a 'direct substantial injury'—from asserting the constitutional rights of others is not applicable when 'outweighed by the need to protect * * * fundamental rights. * * *' *Barrows* v. *Jackson*, 346 U. S. 249, 255-58 (1953). See, e.g. *Joint Anti Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123, 149-154 (1951); *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925); *Truax* v. *Raich*, 239 U. S. 33 (1915). Cf. *Communist Party* v. *United States*,— F. 2d—(D.C. Cir. March 3, 1967).
>
> "If the state attaches consequences to the claim of the privilege against self-incrimination, and the consequences are sufficiently severe and immediate so that the individual's constitutional right has been violated, that right may be championed by another whose injury flows directly from the constitutional deprivation. Indeed, consideration of the personal right may become essential should its alleged impairment result in a denial of due process to the party (here, possibly, the corporation) who may suffer an immediate economic harm. Cf. *Pierce* v. *Society of Sisters, supra; Truax* v. *Raich, supra.*"

See also, *Columbia Broadcasting System* v. *United States*, 316 U. S. 407, 422-423 (1942), *Bantam Books* v. *Sullivan*, 372 U. S. 58, 64-65 fn. 6 (1963).

The opinion of the district court and the cases cited by it were totally ignored by the Attorney General and the

District Attorney. They also did not mention the numerous holdings of this Court cited above, upholding the standing to sue of a litigant whose constitutional rights are being impaired by actions ostensibly directed at another. In light of these decisions it is now manifestly futile to deny plaintiffs' standing to sue. This futility is compounded by the fact that the Attorney General is also arguing in *Campbell Painting Co:* v. *Reid,* October Term No. 673 that the corporation does not have standing to sue.

(b) Mootness with respect to the District Attorney

The District Attorney contends that irrespective of plaintiffs' remedies against defendant Samuel Adler, plaintiffs are not entitled to any injunctive relief against him as district attorney because he has done everything he intends to do. He has called all the witnesses whom he intended to threaten with Section 103-b. He has mailed all the notices he wanted to send to state and city agencies invoking Section 103-b and its sister statutes. The District Attorney thus argues the plaintiffs have no call for an injunction against him since the damage he has intended to cause has been done.

We submit that the District Attorney now cannot be heard to say the matter is moot since plaintiffs have been wronged by his actions which in fact were not even sanctioned by the applicable statutes. If nothing else, plaintiffs are entitled to an affirmative injunction ordering the District Attorney to advise all public agencies he notified of any determination that the applicable statutes are unconstitutional or that the applicable statutes were improperly invoked by him.

(c) The right to a public contract

Both the Attorney General and the District Attorney emphasize that there is no property right to a public con-

tract in New York. This may well be so. But the argument based on this was characterized by the district court as a "facile, but question-begging generalization". It also ignores the fact that the State and City are bound by the 14th Amendment from acting arbitrarily, unreasonably and capriciously even in areas where they have wide discretion.

Thus, the states have been held to constitutional standards on such discretionary privileges as public employment, *Keyishian* v. *Board of Regents*, 385 U. S. 529 (1967), *Slochower* v. *Board of Education*, 350 U. S. 557 (1956); tax exemption, *Speiser* v. *Randall*, 357 U. S. 513 (1958); unemployment compensation, *Sherbert* v. *Verner*, 374 U. S. 398 (1963); appointment as a notary, *Torcaso* v. *Watkins*, 367 U. S. 488 (1961); admission to practice law, *Spevack* v. *Klein*, 385 U. S. 511 (1967); *Schware* v. *Board of Bar Examiners*, 353 U. S. 796 (1957); continued residence in a city public housing project, *Thorpe* v. *Housing Authority*, 386 U. S. 670 (1967); and continuance as a student in a state university, *Dixon* v. *Alabama Board*, 294 F. 2d 150 (5th Cir. 1961). Manifestly, just because the State and City have some discretion in the award of public contracts does not mean that the Fourteenth Amendment safeguards are not applicable or that the State can justify any action no matter how arbitrary or how they diminish constitutional rights.

POINT II

Defendants have failed to demonstrate any reason justifying abstention.

In our jurisdictional statement we set forth a number of reasons why the district court never should have abstained in the first place. But our prime argument was that the subsequent decisions of the New York Court of

Appeals in *Gardner* v. *Broderick,* 20 N. Y. 2d 227 (1967), appeal pending, No. 635 Oct. Term 1967, and *Campbell Painting Co.* v. *Reid,* 20 N. Y. 2d 370 (1967), appeal pending, No. 673 Oct. Term 1967, removed any ground there might have been for federal abstention. Both the Attorney General and the District Attorney substantially ignore the other arguments against abstention and concentrate on their contention that *Campbell* and *Gardner* do not obviate any need for abstention.

Their argument is hard to follow for the reason that neither ever articulates what possible future questions of New York State law are still open for decision after *Campbell* and *Gardner.* They talk about the Department of Purchase's present policy of convening a Board of Responsibility to determine whether or not to invoke Section 103-b. But *Campbell,* a case where no such procedure was followed and yet the disqualification of a bidder under a sister statute of 103-b was sustained, indicates that the Department of Purchase's procedure, so far as the Courts of New York State are concerned, is superfluous. The New York Court of Appeals has indicated that it will uphold disqualification of any bidder if one of its officers or directors had exercised his constitutional right against self-incrimination in a Grand Jury investigation covered by 103-b. Thus, following *Campbell,* any disqualification ordered by a Board of Responsibility will be sustained by the New York Courts so long as there is a finding that the bidder or one of its officers or directors exercised its constitutional right against self-incrimination before a Grand Jury. Any other finding by the Board of Responsibility will be so much surplusage.

Thus, in effect, a Board of Responsibility is given *carte blanche* to disqualify any bidder who falls within the

ambit of Section 103-b since such disqualification can be sustained simply by pointing to the exercise of the privilege against self-incrimination. In other words, there is no further question of New York law to adjudicate. At best, plaintiffs' corporations can be disqualified whenever a Board of Responsibility pleases and these corporations would have no further state remedy against such disqualification.

Moreover, the record herein amply demonstrates what is contemplated by the Department of Purchase's procedure. The example of the Dairymen's League Cooperative Association Inc. and its disqualification graphically demonstrates what is likely to happen before any Board of Responsibility and how that procedure in practice impairs the constitutional protection against self-incrimination. It would be an obvious undermining of the right against self-incrimination to subject anyone to explaining, to a Board's satisfaction, why he exercised his constitutional right. This constitutional right cannot be impaired by the State's claim of a duty of candor owing to it. For there can be a duty of candor only where there is a duty to speak. And there is no duty to speak in explanation of why one exercised the right against self-incrimination. *Hoffman* v. *United States,* 341 U. S. 479 (1951). Furthermore, if there was any issue of fact to determine it could be decided by the federal courts just as well as the state courts since abstention applies to issues of state statutory interpretation and not to issues of fact.

In this connection the motions of the three defendants are confusing as to precisely what is happening. In particular, the District Attorney's brief states (at page 9) the Department of Purchase's proceedures are "altogether independent of section 103-b". What we have here are

three specific state statutes applying by their terms to every state agency, municipal corporation and public authority in the State of New York. But, the District Attorney apparently contends that these state statutes can be disregarded by the City of New York, and instead the City can achieve the identical result mandated by the statutes through the guise of a Board of Responsibility meeting pursuant to a general local resolution. This illustrates what we meant in the jurisdictional statement when we said that plaintiffs have been continually presented with a moving target. But however much the target moves, the effect is still unconstitutional state conduct whether achieved through a statute, decision of a Board of Responsibility, or threat of a district attorney.

In this connection the Corporation Counsel argues that its procedure is constitutional and does not even mention the Court of Appeals opinion in *Campbell* which would allow the earlier procedure of automatic disqualification. We have argued at length in the jurisdictional statement why the Department of Purchase procedure is unconstitutional. But in any event, should this Court fail to act, the Department of Purchase and the multitudinous state and city agencies covered by the broad scope of the applicable statutes can in the future adopt a policy of automatic disqualification without any fear of interference by the New York State Courts. Certainly, the Corporation Counsel's prior record of changing his position every time he appeared before the court below cannot give plaintiffs any faith that Department of Purchase will consistently adhere in the future to its policy of the moment.

In summary, the New York Court of Appeals has spoken and said that under New York law any exercise of the

right against self-incrimination can disqualify a bidder on a public contract. With such a holding there is no reason to abstain further. The sole remaining issue of law is whether such a rule is constitutional and this issue is tendered to this Court by this appeal.

POINT III

The questions presented are substantial.

All three defendants contend that the issues presented are not substantial. Of course such contentions fly in the face of the explicit words of the district court to the contrary. But defendant's argument has other flaws. They all rely on a number of cases decided before this Court's opinions in *Spevack* v. *Klein*, 385 U. S. 511 (1967) and *Garrity* v. *New Jersey*, 385 U. S. 493 (1967). But the continued validity of these cases was specifically questioned by this Court in *Spevack* when it said at fn. 2

> "We do not stop to re-examine all the other prior decisions of that vintage [before this Court's decision in *Malloy* v. *Hogan*, 378 U. S. 1 (1964)] to determine which of them, if any, would be decided the other way because of 'the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to *suffer no penalty* • • • *for such silence*', as declared in *Malloy* v. *Hogan*." (Emphasis added by this Court.)

Moreover, the *Spevack* decision specifically overruled an earlier decision of this Court, *Cohen* v. *Hurley*, 366 U. S. 17 (1961), stating that while not overruled by *Malloy* v. *Hogan*, "the majority indicated that the principle upon which it rested had been seriously eroded." As a conse-

quence the precedential value of any pre-*Malloy* case has been greatly vitiated.

Further, this Court has never decided, either before or after *Malloy*, any case on the right of a state to impair the privilege against self-incrimination of a public contractor.

All three defendants hold that *Spevack* does not apply to public officials although that opinion simply states that this Court is not ready to decide that issue. Then, based upon this most dubious premise, defendants supported by absolutely nothing, state that a public contractor resembles a public employee more than he does a state licensee, such as a lawyer. If anything, an independent businessman, contracting with a state, is more clearly akin to an independent attorney licensed by a state. We submit that the question of the constitutional rights of private businessmen, who seek public contracts, are too substantial to be left to vague inferences and inexact analogies, and hence should be decided by this Court after plenary consideration, including briefs on the merits and oral argument.

Incidentally in our jurisdictional statement we discussed at length why the Department of Purchase procedure is unconstitutional. These arguments were ignored by the defendants, except for the Attorney General's statement that our argument is "astounding" without ever stating why (at page 8).

The unconstitutionality of section 103-b is in fact demonstrated by all three defendants' briefs. They all contend that section 103-b is needed as a club to obtain incriminating Grand Jury testimony from officers and directors of public contractors and to penalize any public contractor who refuses to give evidence against himself before a Grand Jury investigating possible violations of the New York Penal Law. (No other gloss can be put

upon the Grand Jury investigation by virtue of the fact that the Grand Jury has power to grant immunity to witnesses appearing before it.) It is not an investigation "by Government buyers", (See Corporation Counsel's brief, page 8) as neither the Department of Purchase or any other governmental agency is directly involved in the investigation. Hence, it cannot be justified as an attempt of a governmental agency to protect itself. Rather it can only be defended for what it is, an attempt to obtain by coercion self-incriminating testimony for use directly against a reluctant witness in a criminal proceeding. We submit that at the least such a radical departure from the principles of the Fifth and Fourteenth Amendments requires full consideration by this Court.

CONCLUSION

For all the reasons stated herein and in plaintiffs' jurisdictional statement, the appeal here raises substantial issues requiring plenary consideration by this Court with briefs on the merits and with oral argument for their resolution.

Dated: New York, New York
November 27, 1967

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

HOLLAND ET AL. *v.* HOGAN, DISTRICT ATTORNEY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 653. Decided June 17, 1968.

PER CURIAM.

The judgment is vacated and the case is remanded to the United States District Court for further consideration in light of *Gardner* v. *Broderick*, No. 635, and *George Campbell Painting Corp.* v. *Reid*, No. 673, both decided June 10, 1968.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that probable jurisdiction should be noted and the case set for oral argument.